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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1945.

No. 552

THE OFFICIAL AVIATION GUIDE COMPANY, INC.,
Petitioner,

VS.

AMERICAN AVIATION ASSOCIATES, INC., WAYNE
W. PARRISH, H. D. WHITNEY AND THOMAS E.
LINDSEY,
Respondents.

**PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.**

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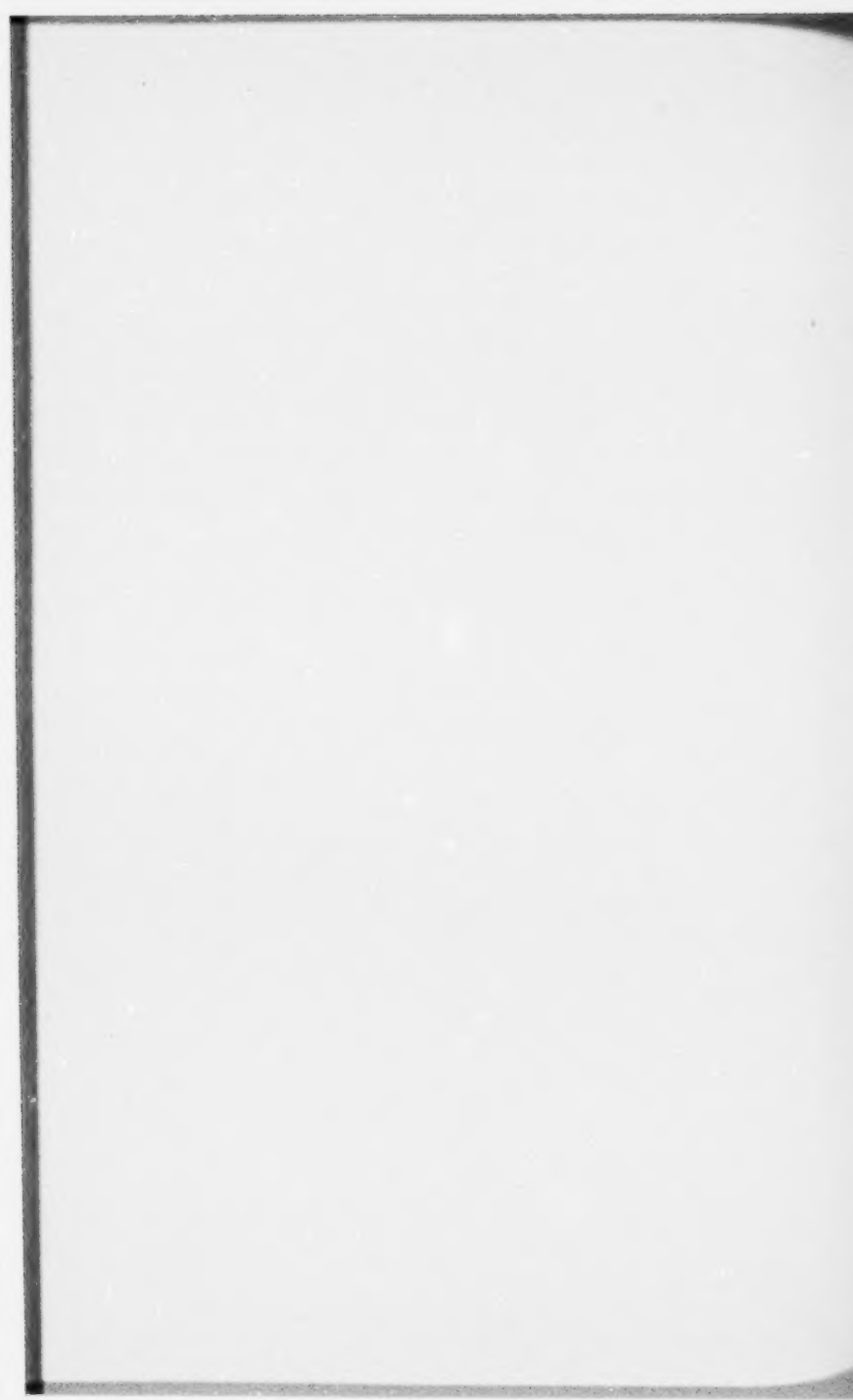


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IN THE

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No.

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Petitioner,
vs.

AMERICAN AVIATION ASSOCIATES, INC., WAYNE
W. PARRISH, H. D. WHITNEY AND THOMAS E.
LINDSEY,
Respondents.

**PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner, Official Aviation Guide Company, Inc.,
prays that a writ of certiorari issue to review the decision
of the United States Court of Appeals for the Seventh Cir-
cuit, entered herein June 15, 1945 (R. 623), reported at
65 U. S. P. Q. 553.

Petition for rehearing was duly presented (R. 633) and
denied August 9, 1945 (R. 654).

A certified transcript of the record, including the proceedings in the Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

I.

Jurisdiction.

(a) Federal jurisdiction of the courts below existed under the Copyright Laws of the United States.

(b) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of Congress February 13, 1925, 43 Stat. 938; U. S. P. C. A., Title 28, Section 347 (a).

II.

Questions Presented.

The main questions, which involve the copyright laws and decisions applicable are:

1. Whether a duly issued copyright on a monthly publication, as a whole, protects the copyrightable component parts thereof, as provided in Section 3 of the Copyright Act, or merely the publication *as a whole*, and, therefore, whether the Court of Appeals was correct in denying all protection under petitioner's copyrights because it concluded that the accused publication, *as a whole*, was not identical with the copyrighted publication in sequence and arrangement, and therefore, not similar enough *as a whole*, to constitute infringement, notwithstanding various of the component parts are substantially identical.

2. Whether the well established rule of copyright law that a copy, sufficient to constitute infringement, is one which ordinary observation would cause to be recognized as being taken from the original (*Daly v. Palmer*, 6 Blatch.

270; *King Features Syndicate v. Fleischer, et al.*, 299 Fed. 533 (C. C. A. 2); *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1; *Encyclopedia Britannica v. American Newspaper Association, et al.*, 130 Fed. 460 (C. C. N. J.), aff'd 134 Fed. 831 (C. C. A. 2) should be disregarded, as was done by the Court of Appeals.

3. Whether the Court of Appeals was correct in disregarding the decisions of this and other courts which hold that a copy, in order to be an infringement, need not be identical in sequence, arrangement, or otherwise (*Callaghan v. Myers*, 128 U. S. 617, at page 661; *Ansehl v. Puritan Pharmaceutical Co., et al.*, 61 F. (2nd) 131 (C. C. A. 8), at page 138, and cases there cited; *King Features Syndicate v. Fleischer*, 299 Fed. 533 (C. C. A. 2), at page 535, and cases there cited; *Lawrence v. Dana*, Fed. Case No. 8,136, 4 Cliff. 80).

4. Whether the rule of this court (*Adamson v. Gilliland*, 242 U. S. 350; Rule 52(a), Rules of Civil Procedure) that the findings of fact of the District Court, who heard and saw all witnesses in open court on the question of copying and similarity, and whose findings are amply supported by the uncontradicted evidence, should be adopted and followed, or disregarded, as was done by the Court of Appeals in the present case.

5. Whether Section 41 of the Copyright Act, to the effect that a copyright is distinct from the property and the material object copyrighted and that the sale or conveyance by gift or otherwise of the material object of itself does not constitute a transfer of the copyright, should be disregarded, as was done by the Court of Appeals.

6. Assuming the airlines may have furnished petitioner with the information and facts depicted in the listing sections (one of the component parts), and paid a listing fee, whether that gives them any right or title to the

copyright as a whole or to petitioner's *style, garb and expression* of its original component parts, or puts the airlines or any of them in position to give legal immunity to an otherwise infringing *competing publisher*, in view of: *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 274 Fed. 932 at 934 (Circuit Judge Learned Hand), *aff'd* 281 Fed. 83 (C. C. A. 2); *Houghton Mifflin Co. v. Stackpole Sons, Inc., et al.*, 104 F. (2d) 306 (C. C. A. 2); *Triangle Publications v. New England Newspaper Pub. Co.*, 46 F. Supp. 198 (D. C. Mass.); *R. R. Donnelly and Sons Co. v. Haber, et al.*, 43 F. Supp. 456 (D. C. N. Y., Judge Campbell); *Hoague-Sprague Corporation v. Frank C. Meyer*, 31 F. (2d) 583; *Deward & Rich v. Bristol Savings & Loan Corp.*, 29 F. Supp. 777 (D. C. Va.); Weil on Copyrights, 1917 Edition, page 207, Section 542; *Anschl v. Puritan Pharmaceutical Co.*, 61 F. (2d) 131 (C. C. A. 8).

7. Whether petitioner should be denied all relief under its copyright, as to all or any part thereof, merely because some of the subscribers (the airlines) furnished most of the facts depicted in the listing section, and paid a nominal listing fee.

8. Whether the Court of Appeals can properly disregard the Copyright Act and the well established decisions of this and other courts and the controlling facts in the case, and by so doing, deny the copyright owner all relief.

9. Whether the copyright owner should be denied all relief, where copying is found and admitted and the accused publication, save for the outside cover, would obviously be recognized as being taken from the copyrighted publication, including the component parts thereof, when there is no proof that either the publication as a whole or the copyrightable component parts asserted were in the public domain.

III.

Summary and Short Statement of the Matters Involved.

Continuously, since early 1929, petitioner has prepared and issued new editions monthly of a publication known as the "Official Guide of the Airways." This has been its sole business from the outset. Each edition was duly copyrighted. The copyrights asserted as being sufficient for this case are for the December 1942, January, February, March and April 1943 editions. It is admitted (a) that the petitioner obtained copyrights for each edition commencing in 1929 (R. 51); (b) that petitioner is the valid owner of copyrights thereon (R. 52); (c) that petitioner published its first edition in February 1929 (R. 108); (d) that it has continuously since put out a "new edition each month" (R. 353); and that the first edition of respondents' accused publication was published in April 1943 (R. 108). Petitioner has reserved to itself all rights under its copyrights.

Petitioner's copyrighted publication is devoted primarily to master airline charts and layouts depicting and clothing in petitioner's original style, garb and *expression*, information relating to air travel, airmail and air express of paramount importance to actual and prospective users of air transport and to the industry generally (R. 353-354). Petitioner was a pioneer in this field in 1929 (R. 354).

Aside from the complete publication being original and new as a whole, it embodies several copyrightable component parts, such as the *master airline charts, contents section, layout and listing sections clothing the desired information and facts in petitioner's own expression, style and garb*, all conceived and originated by petitioner at its own expense, for its own use, as an inherent part of its publication (R. 64, 67, 68, 355-356, 360, 393, 394).

Sometime after establishing the publication, most of the airlines, at petitioner's suggestion, paid a nominal listing fee (R. 357), and for each new monthly edition thereafter generally furnished petitioner with current changes or corrections as to facts pertaining to their respective lines, by noting them on petitioner's page layouts or tearsheets, containing petitioner's *expression, style and garb*, submitted by petitioner for that express purpose (R. 360, 437).

Several years after the publication had been on the market, petitioner accepted from the airlines a very limited amount of promotional display sections which never formed but a relatively small part of the whole publication. However, as the airlines prepared and furnished the copy for these promotional display sections, as published, they were not relied on by petitioner in the courts below, as a copy-rightable component part of its publication and are not relied on here.

Samples of petitioner's copyrighted publication "Official Guide of the Airways", and respondents' accused publication entitled "Universal Airline Schedules" are, we understand, being filed with this court as Petitioner's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10 (offered R. 353-354), and Petitioner's Exhibits 25 and 26 (offered R. 396).

Before starting any business in connection with the accused publication, the respondents employed Chase, petitioner's *ex alter ego*, (R. 363, 532) to prepare, manage and direct such a publication. Long before respondents had prepared anything or any part of their publication, they sent to several different printers a copy of petitioner's genuine publication, including the charts, for the purpose of obtaining estimates of the cost of printing (R. 363-364). The estimates for printing were based, not on respondents' yet unprepared copy, but on petitioner's genuine publication (Pl. Exh. 17 and 18, R. 466, 582).

Before respondents prepared any part of their infringing publication, they prepared and mailed to the industry a brochure (Pl. Exh. 11, R. 364, 365, 467, 541, 583) setting forth specifications undoubtedly based on petitioner's publication, as it reads exactly thereon, and at that time respondents' publication was yet to be prepared. In that brochure respondents featured the fact that Chase was formerly in charge of petitioner's copyrighted publication.

Respondents repeatedly attempted to buy petitioner's publication and copyrights, and threatened that if it did not sell on respondents' terms, they would drive petitioner out of business (R. 349, 410-411, 414-419).

Before receiving any material or any data of any kind from the airlines, respondents' employees proceeded to prepare the accused publication, and in doing so, had before them several copies of petitioner's copyrighted publication. In preparing copy for the printer, they admittedly copied page after page from petitioner's copyrighted publication (R. 365, 367, 523, 583).

Before respondents received anything from the airlines or any request to publish anything for them, their president had definitely decided on the expression, form, style and garb of the proposed publication charged to infringe, at which time he had several copies of petitioner's copyrighted publication before him, and the infringing copy shows that he did follow petitioner's publication as his model (Pl. Exh. 11, R. 541-542).

Aside from the name and the outside of the cover, the two publications are substantially identical in the main, and particularly as to the copyrightable component parts asserted below and here. The master chart appearing on the inside of the front cover of petitioner's March 1943 issue and respondents' master chart appearing on the inside of the back cover, particularly the issue for August

1943, prove beyond a doubt that petitioner's was the model for respondents'. The style, garb, expression, arrangement and combination as a whole is the same. No master chart or publication like petitioner's is shown to be in the public domain. No such contention is or can be made. The *expression, style* and *garb* of the contents and listing sections of both publications are substantially identical, as are the maps of Central and South America. A look at one and then the other will so demonstrate.

The District Court (Judge Campbell) who saw and heard all the witnesses in open court on the matter of copying and similarity, after several days' trial, and after extensive briefs, rendered a written opinion in favor of petitioner, holding the copyrights valid and infringed, (R. 568) and later entered detail findings on all the pertinent facts consistent with the opinion (R. 578).

The appellate court did not hold the copyrights invalid but, by completely disregarding Judge Campbell's findings of fact *which were fully supported by the evidence*, denied petitioner relief not only on the publication as a whole, but as to all the copyrightable component parts.

After making a *sequence* comparison as to the *position* of the different component parts in the two publications (R. 626), the Appellate Court said (R. 626):

"From *this comparison*, it is apparent that although much of the information carried by the two magazines is the same, the sequence and arrangement thereof are not identical. Nor are they similar enough to warrant the charge of infringement." (Italics ours.)

This "*comparison*" mentioned by the Court of Appeals and on which it concluded there was no infringement, immediately precedes such conclusion (R. 626). In making this sequence comparison, the Court of Appeals said (R. 626): "Comparing the March Guide and the April Sched-

ules as to *sequence* and arrangement, we find the following:" (italics ours). It then sets up two columns, one entitled "Guide", and the other entitled "Schedules". In each it lists twenty items. Under the column "Guide", it lists as Item 1, "United States Map". This is the large master airline fold-out chart appearing on the *inside* of the *front* cover of petitioner's publication. As Item 1 under "Schedules", it lists "Publication and Services of American Aviation Associates, Inc.", instead of listing the fold-out United States master airline chart which appears on the *inside* of the *back* cover of respondents' publication. At no place in that comparison does the Court of Appeals compare or refer to the fact that in petitioner's the master airline chart is on the inside of the *front* cover, while in respondents', substantially the same master airline chart, having substantially the same expression, style and garb, is on the inside of the *back* cover. Apparently the Court of Appeals thought that if the respondents transposed the position of this map to some other part of the book, rather than having it on the inside of the *front* cover, then there was no infringement. It is elementary that infringement of a component part is not avoided because the defendant places it in a different position or spot in its publication or by changes in "*sequence*". This "*sequence*" comparison of Item 1 by the Court of Appeals may be taken as typically illustrative of most of the other nineteen items which it mentions in its "*sequence*" comparison. To make such a comparison to show that the "*sequence*" is different, that is, the component parts are differently positioned, is obviously under the law, of no help or interest in determining the question of infringement, because the copyright law *covers each and every copyrightable component part to the same extent as if each was separately copyrighted*. The copyright owner is entitled to protection, regardless of transposition or changes in "*sequence*". This rule is so well established

that the citation of authorities seems quite unnecessary here.

It is thus clear that the Appellate Court denied all relief upon the publication broadly, because the *sequence* and *arrangement*, as a whole book, were not identical or similar enough. Thus it denied all relief on the component parts notwithstanding respondents' corresponding component parts are, as the District Court found (R. 570, 584, 585), substantially the same in expression, style and garb (see Pl. Exh. 3, Petitioner's March 1943 issue, and Pl. Exhs. 25 and 26, Respondents' issues). In doing so it *necessarily disregarded the Copyright Act* (Section 3) *which provides for protection on each and all component parts.*

IV.

Reasons for Granting the Writ.

1. The decision of Judge Kerner, in the Court of Appeals, is in direct conflict with and contrary to the Copyright Act and the uniform decisions of this and other United States courts.

2. It arbitrarily denies copyright protection on petitioner's publication, not only as a whole, but on the component parts thereof because the sequence, and position of the parts "are not identical," and "not similar enough to warrant the charge of infringement" (R. 626).

3. It also denies petitioner relief on its publication as a whole and the copyrightable component parts thereof because certain airlines furnished information and facts depicted in certain component parts, namely, the listing sections and paid a listing fee, notwithstanding the evidence

clearly shows that the layout, expression, style, garb and arrangement of the listing sections was conceived, originated and prepared by petitioner itself, at its own time and expense, as an inherent part of its publication without any request or contribution from the airlines, long before receiving any material from those airlines.

4. On the question of infringement, it disregards the rule in this and other courts that if ordinary observation would cause the accused copy to be recognized as being taken from petitioner's, then it is sufficiently similar to make out infringement.

5. It disregards the Copyright Act, Section 3, which provides that under a copyright on a publication *as a whole*, the owner is entitled to such copyright protection on each and all of the component parts thereof, as he would have if each part were individually copyrighted.

6. One phase of Judge Kerner's decision, by way of *dictum*, apparently held that because an airline paid a nominal listing fee and supplied facts and information regarding its line to petitioner, which information and facts petitioner clothed in its own *previously* established layout, expression, style and garb, it could give immunity to a competing publication, as a whole, thus creating and applying, for the first time, a new legal bar to the grant of protection under a copyrighted publication and its component parts, a question of great general importance, which should be settled by this court.

7. It decided an important federal question in direct conflict with the facts in this record and the applicable decisions of this and other courts.

8. It decided a question of great general importance and a question of substance relating to the Statutes of the United States contrary to and without giving proper effect to applicable decisions of this and other courts.

9. The decision of the Court of Appeals departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

10. The decision of the Court of Appeals has not given proper effect to applicable decisions of this and other courts.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directing the United States Court of Appeals for the Seventh Circuit to certify and send to this court for determination, on a day certain to be therein named, a complete transcript of the record and all proceedings in the case, to the end that the said judgment in the Court of Appeals be reviewed and determined by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CLARENCE J. LOFTUS,

JOHN M. MASON,

Counsel for Petitioner.

October 20, 1945.





BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The District Court's opinion (Judge Campbell) is at page 568 of the Record (Reported at 62 U. S. P. Q. 178). His supplemental opinion is at page 577, and his findings of fact and conclusions of law at page 578 of the Record.

The Court of Appeal's opinion (Judge Kerner) is at page 623 of the Record. It is reported at 65 U. S. P. Q. 553.

Jurisdiction.

The petition, on page 2, sets forth the grounds on which jurisdiction is invoked.

A Statement of the Case and Questions Involved.

The petition sets forth, on pages 2 to 12, a statement of the questions involved, and a brief summary of the material facts necessary to an understanding of the case, and also the reasons relied upon for the allowance of the writ. The facts are enlarged upon in the ensuing argument.

Summary of Argument.

The argument is summarized in the foregoing petition and in the following:

ARGUMENT.

I.

Statement.

The District Court found the copyrights valid. That holding was not reversed by the Appellate Court.

The contents of the publication are admittedly proper subject of copyright. There is not one particle of evidence, and indeed no assertion, that the publication as a whole or any of the component parts asserted, below and here, were or can be found in the public domain. That being so, the only remaining question is whether the respondents are guilty of infringing, not only petitioner's publication as a whole, but any of the copyrightable component parts asserted.

The undisputed evidence shows that the publication as a whole was originated and prepared by petitioner through its employees (R. 64, 67, 68, 355, 360, 393, 394) and that the component parts, such as the master airline chart, the airline maps of Central and South America, the contents section and listing sections were originated and prepared by petitioner's employees. There is not one scintilla of evidence that the model for either can be found in the public domain or that anyone except petitioner's employees contributed one iota to their production. The corresponding map appearing on the inside of the back cover of respondents' publication (see particularly the August 1943 issue Plaintiff's Exhibit 26) is substantially identical in all respects. Mere ordinary observation would certainly cause the accused copy to be recognized as being taken from petitioner's. The same is true as to the Central and South American maps and the contents section. Respondent

utterly failed to produce anything in the public domain which corresponded in the slightest with any of the component parts. They did say they referred to some other maps, which they produced, (some in the public domain and some not), but whether or not they were in the public domain, each and all are substantially different and do not present any similarity to the expression, arrangement, style and garb of petitioner's and respondents' charts and maps.

There is no proof whatever in the case that the layout, expression, style, arrangement and garb of the listing sections were in the public domain. The evidence shows very clearly and the District Court found (R. 579-580) that the layout, expression, style and garb was conceived and originated by petitioner through its employees, at its own time and expense and for its own purpose (R. 64, 67, 68, 355, 360, 393, 394). There is no evidence that the airlines or any outsider initially prepared or contributed to the preparation of the style, expression, and garb of the component parts identified as the listing sections. The airlines merely, as admitted by witnesses on both sides (R. 360, 437, 438), noted corrections and changes for new editions, *on layouts or tear sheets initially prepared by petitioner at its own expense*. Most of them also paid a nominal listing fee.

As this court said in *Bleistein v. Donaldson*, 188 U. S. 239, at page 248, in holding that the copyright on the circus posters there involved, which had been made by the plaintiff for advertisements of a circus owned by one Wallace, was taken out properly by plaintiff:

“There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things.”

So it is with the case at bar, the employees who made petitioner's master airline chart, its maps of Central and South America, its contents section, and the expression, style, garb, arrangement and combination of petitioner's listing sections were each and all produced by persons employed and paid by the petitioner in their establishment to make those very things.

Page after page of the listing sections appearing in the respondents' accused publication, as admitted by their own employees, were copied, both directly and indirectly, from petitioner's publication (R. 365, 367, 423, 449, 523). The listing sections are substantially identical with petitioner's in *expression, layout, style, arrangement and garb*. Clearly, ordinary observation would cause the accused copy of the listing sections to be recognized as being taken from petitioner. In view of this and the further facts heretofore pointed out in the petition it is clear that the respondents used plaintiff's copyrighted publication and the component parts thereof as their *model* for respondents' publication and *its component parts*.

The copyrights on such component parts are valid unless such component parts are proven to be in the public domain. The burden is heavily on the respondents so to do. There is not one scintilla of evidence in the entire record that the expression, style, garb and arrangement of the component parts of petitioner's publication asserted below and here, including the listing sections, can be found in the public domain.

Respondents introduced a number of prior maps, but none of them show anything even approaching petitioner's charts or maps as having been in the public domain. They also introduced a large scrap book (Def. Exh. M) containing a large amount of belated correspondence between the respondents and various airlines, and data received from

several airlines. This fails to show that petitioner's publication or any of the component parts here asserted were in the public domain, but does tell us, louder than words, that respondents used petitioner's publication as their model and copied therefrom, both directly and indirectly, particularly as to expression, style and garb. Moreover, this material furnished respondents by the airlines did not contain petitioner's expression, style and garb. That was taken from petitioner's copyrighted publication.

The District Court found (R. 570) that respondents copied petitioner "in the general style, arrangement, form and garb * * * with a few insignificant changes in coloring and lettering".

The District Court, after referring to the fact that Chase was petitioner's ex *alter ego* and had entered the employ of the respondents on January 2, 1943 said (R. 570):

"He commenced immediately on getting printers' bids and assembling material for the defendants' publication, the first issue of which was planned for March 1943. In early February, Chase advised Parrish (defendants' president) that he could no longer continue with the work due to legal advice which he had received to the effect that the work he was doing constituted a violation of plaintiff's copyright. * * * Defendants stopped work on the proposed March issue and started assembling material for a first issue to be released in April of 1943. The source material for this initial issue of defendants' publication is in evidence and although defendants' employees state that it was entirely made up without copying from plaintiff's publication, I am convinced from a review of it that plaintiff's publication was the source of a great part of the material.

"Comparing the defendants' accused issues with the plaintiff's copyrighted issues, it is apparent that the general style, arrangement, form and garb of the plaintiff's publication has been copied by the defendants with a few insignificant changes in coloring and

lettering. In view of the uncontroverted evidence that the defendants' employees had issues of plaintiff's publication before them when preparing material for defendants' publication; in view of the striking similarity in the two publications; in view of the defendants' previous efforts to buy plaintiff's publication; in view of defendants' use of plaintiff's editor Chase and their selection of plaintiff's printers; in view of certain common errors set forth in the briefs, which are found in plaintiff's copyrighted issues and defendants' accused issues, it is my opinion that the defendants set out to and did produce a copy of plaintiff's copyrighted publication which they proposed to exploit through their alleged better contacts with the aviation industry."

The Court further said (R. 571):

"although in this case an explanation for such common errors was offered * * * nevertheless the explanation when considered in the light of all the testimony and a review of the exhibits fails to convince me of its genuineness."

The appellate court, in its opinion, discussed at length the *external* appearance of the respective publications (R. 624-625) and also *unfair competition* (R. 623, 630-631). Those matters were not involved or asserted below. It seems, therefore, quite clear that the reviewing court was not only confused as to the issues, but being so confused, disregarded the facts and law applicable to the *real* issue.

The issue and matter involved below was whether petitioner's copyrights were valid and infringed and petitioner's property rights thereby violated.

The appellate court also assumed a situation with respect to one of the component parts asserted, namely, the listing sections, and on those assumed facts, which are contrary to the facts found by the District Court and amply established by the record, concluded in effect, that

the petitioner was not entitled to any relief, even though such listing sections had been copied exactly by respondents from petitioner's copyrighted publication and said (R. 628):

"Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 274 Fed. 932, aff'd 281 Fed. 83, is distinguishable because there the plaintiff had at its own expense created the directory and had produced the illustrations of the trade-marks from cuts generally prepared 'by the plaintiff personally,' whereas here the airlines paid plaintiff to print their listings and their employees played a major role in creating them."

Even though the airlines did what the court said, which they did not, that wouldn't change the rule of law or the principle announced in the *Jeweler's* and other cases. The things on which the court relied to distinguish *do not exist in this case*. The facts are to the contrary. The District Court so found (Finding No. 4, R. 579-580). Such finding is amply supported by the evidence.

Instead of the airlines paying petitioner for printing their listing sections and their employees playing a major roll in creating them, the evidence clearly shows to the contrary.

First: Petitioner and its predecessor, through their employees, and at their own time, labor and expense, obtained facts and information relating to air travel, airmail, air express, etc., from various sources through correspondence, telephone calls, personal calls, telegrams, etc., and then created the "Official Guide of the Airways" through their own skill, labor and judgment, using their own original *expression*, treatment, layouts, *style* and *garb* for such sections and other component parts, combined with their own original master airline charts of the United States and maps of Central and South America and contents section, confining the layout to petitioner's own exclu-

sive dimensions, column and page width, style and garb (R. 64, 67, 68, 355-356, 360, 393, 394). This was all done by petitioner through its employees as an inherent part of its publication for its own exclusive use in its copyrighted publication (R. 356). In doing so, neither the petitioner nor its employees were acting in any way as representatives or employees of the airlines nor were they requested, commissioned or paid for so doing by any of the airlines (R. 64, 67, 68). The District Court so found (R. 580).

Second: During the early period the listing sections, containing facts and information clothed in petitioner's own *expression, style and garb*, were carried as to all the airlines in the United States, without any fee or cost whatever to any of them (R. 357).

Third: Petitioner early originated and adopted its own *expression, style and garb* for its listing sections, depicting therein facts, concerning any airline, complete as to information relating to flights, fares, airports, ground transportation, principal ticket offices and cities served, general offices, officers and baggage limitations (R. 64, 67, 68, 355, 360, 393, 394). About September 1930 petitioner asked the airlines to pay a small *listing* fee, which was figured out, not as an advertising rate, but as a nominal listing fee (R. 358). Most of the airlines were quite willing to pay this nominal listing fee.

Fourth: The *expression, style and garb* for the listing sections was originally conceived, prepared and published by the petitioner at its own time and expense and for its own purposes, and not at the instance or request of the airlines (R. 64, 67, 68, 355, 360, 393, 394). However, the petitioner followed the general policy, *admitted by respondents' witnesses*, of preparing and submitting to the airlines each month its own layout embodying petitioner's original expression, style, garb and make-up for the next

new edition. On this the airlines generally noted corrections or current changes as to facts (R. 360). It is admitted by defendants' witness Fry that this was the standard practice of petitioner (R. 437 and bottom page 436, *et seq.*). There can be no dispute about that.

The layout, expression, style and garb of the listing section of petitioner's publication being its own, prepared at its own time and expense, it was at *all times reserved by the petitioner as being its property and under its control.*

District Judge Campbell found from the open court evidence as follows (R. 579-580):

"4. Plaintiff and its predecessor, through their employees, and at their own time, labor and expense, obtained information and facts regarding air travel, airlines, etc., from various sources and then created the publication now known as the 'Official Guide of the Airways' through their own skill, labor and judgment, by compiling, editing and collocating the information and material obtained, using their own original plan of compilation, expression, treatment, sequence, arrangement, style and garb, combined with master charts or maps, confining the layouts to their own exclusive page dimensions, column and page widths, all for the purpose of maintaining general uniformity for readily and quickly giving information to the average passenger concerning air travel, and to afford a fast, efficient reference or compilation of a high degree of readability. This was all done by plaintiff and its predecessor at their own time and expense through their employees as an inherent part of their publication or compilation for their own exclusive use in their copyrighted publication. In doing so, neither the plaintiff nor any of its employees were acting in any wise as employees or representatives of the respective airlines represented in plaintiff's publication."

There is no finding or holding whatever by the Court of Appeals that the component parts asserted below and here,

namely, the master airline chart on the inside of the front cover of petitioner's and on the inside of the back cover of respondents', the South American map, and the contents section, are not substantially identical, *because they are*. Nor is there any finding or holding by the Court of Appeals that the *expression* and the *style* and *garb* of the listing sections of respondents are not substantially identical with the *expression*, *style* and *garb* of petitioner.

The District Court found (R. 580) that not only the copyrighted publication as a whole was conceived, originated and created by the petitioner through its employees, but the "expression, style and garb" of the listing sections (R. 580) and the maps (R. 581) were conceived and originated by the petitioner through its employees, which were the principal component parts relied upon in the District Court. The court further found (R. 586) that the petitioner's copyrights covered its publication, not only as a whole, but also "all component parts thereof". There is no finding or holding by the Court of Appeals that these component parts were in the public domain, or that the expression, style and garb of these component parts were not conceived and originated by petitioner, or that the respondents' corresponding component parts, and the expression, style and garb were not substantially identical. On the contrary, the Court of Appeals went off on an erroneous theory, and by making a *sequence comparison of the entire book* and finding that the sequence as a whole was not identical, concluded therefrom that there was not enough similarity with reference to sequence and arrangement as a whole to make out infringement. It apparently overlooked entirely or disregarded completely the fact that the expression, style and garb of the principal component parts asserted below and here above mentioned are substantially identical, and that the Copyright Act affords protection on each component part.

Every member of the public is entitled to publish the facts depicted in such listing sections, and it is being done in various different publications, but that fact does not permit a competing publisher to copy petitioner's own *expression*, style and garb in which the facts are clothed. The copyright on such component parts is valid unless it is clearly proven to be in the public domain. There is not one scintilla of evidence in the entire record that the *expression, style, garb and arrangement of the component parts* of petitioner's publication, such as the master airline charts of the United States appearing on the inside front cover, the chart of South America appearing in each edition of petitioner's copyrighted work, the contents page, and the listing sections, or indeed the publication as a whole, can be found in the public domain. In fact, there is not even any assertion by the respondents to that effect.

II.

Copyrights on a Publication Not Only Protect the Publication as a Whole, but All of the Copyrightable Component Parts of the Work Copyrighted.

Section 3 of the Copyright Act provides:

"That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

It is thus clear that the Appellate Court was in error in denying petitioner all relief on the theory that the entire publication was not identical in sequence and arrange-

ment, and, therefore, not similar enough to constitute infringement, for under this act the petitioner certainly is entitled to relief, if any one of the copyrightable component parts has been infringed. The test of infringement is not whether they are identical, but, under the well established rule of law, whether or not ordinary observation would cause the accused component parts to be recognized as being taken from petitioner.

It is perfectly clear from an ordinary observation of the master airline chart appearing on the inside back cover of respondents' publication and the Central and South American maps and the contents section and the listing sections that they would be recognized as being taken from petitioner, particularly when the respondents utterly failed to produce any source material in the public domain which corresponds therewith in any degree, insofar as expression, style, arrangement and garb is concerned, and particularly in view of the fact that respondents' employees who had to do with these component parts admitted they had before them several copies of petitioner's genuine publication at the time of preparing the respondents' publication.

The District Court found (R. 585) that as early as January 29, 1943 and prior thereto respondents deliberately and definitely conspired and planned between and among themselves to use petitioner's publication as their model and to copy from it and publish a copy of petitioner's model, and that they jointly and severally carried out such plan "with a few insignificant changes", and that the material alleged to have been received by the respondents from the airlines after February 11, 1943, pertaining to the April 1943 edition of respondents' accused publication did not influence any change in respondents' predetermined plan to copy from petitioner's publication and use it as their model in preparing the accused publication. The

Court of Appeals has not disturbed that finding in any shape, manner or form. Therefore, this case comes before this court with that finding undisturbed.

III.

In Copyright Law, a Copy Sufficient to Constitute Infringement Is One Which Ordinary Observation Would Cause to Be Recognized as Being Taken from the Original.

Daly v. Palmer, 6 Blatch. 270; *King Features Syndicate v. Fleischer, et al.*, 299 Fed. 533, (C. C. A. 2); *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1; *Encyclopedia Britannica v. American Newspaper Association, et al.*, 130 Fed. 460, (C. C. N. J.), *aff'd* 134 Fed. 831 (C. C. A. 2).

This court, in *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1, in defining what constitutes an infringing copy in a copyright suit, speaking through Mr. Justice Day, said, at page 17:

“A definition was given by Bailey, J., in *West v. Francis*, 5 B. & A. 743, quoted with approval in *Boosey v. Whight, supra*. He said: ‘A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.’”

IV.

A Copy, in Order to Be an Infringement, Need Not Be Identical in Sequence, Arrangement or Otherwise.

Callaghan v. Myers, 128 U. S. 617, at page 661; *Ansehl v. Puritan Pharmaceutical Co., et al.*, 61 F. (2d) 131, (C. C. A. 8), at page 138, and cases there cited; *King Features Syndicate v. Fleischer*, 299 Fed. 533, (C. C. A. 2), at page 535, and cases there cited; *Lawrence v. Dana*, Fed. Case No. 8,136, 4 Cliff. 80.

V.

Defendants Can Have No Immunity from Their Infringing Acts on the Facts Shown by This Record.

Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 274 Fed. 932 at 934 (Circuit Judge Learned Hand), aff'd 281 Fed. 83 (C. C. A. 2); *Houghton Mifflin Co. v. Stackpole Sons, Inc., et al.*, 104 F. (2d) 306 (C. C. A. 2); *Triangle Publications v. New England Newspaper Pub. Co.*, 46 F. Supp. 198 (D. C. Mass.); *R. R. Donnelley and Sons Co. v. Haber, et al.*, 43 F. Supp. 456 (D. C. N. Y., Judge Campbell); *Hoague-Sprague Corporation v. Frank C. Meyer Co.*, 31 F. (2d) 583; *Deward & Rich v. Bristol Savings & Loan Corp.*, 29 F. Supp. 777 (D. C. Va.); Weil on Copyrights, 1917 Edition, page 207, Section 542; *Ansehl v. Puritan Pharmaceutical Co.*, 61 F. (2d) 131 (C. C. A. 8).

VI.

As Respondents Resorted to and Used Petitioner's Publication as a Whole, and Its Component Parts as Their Model to Pattern After, Directly and Indirectly, in Preparing Their Corresponding Publication, Charts, Maps and Other Component Parts Here Asserted, Petitioner Is Clearly Entitled to Relief Under the Authorities.

Springer Lithographing Co. v. Falk, 59 Fed. 707 (C. C. A. 2); *Hartfield v. Peterson, et al.*, 91 F. (2d) 998 (C. C. A. 2); *Deutsch et al. v. Arnold*, 98 F. (2d) 686, (C. C. A. 2); *Mecanno, Ltd. v. Wagner*, 234 Fed. 912, 922; *Edwards & Deutsch Lithographing Co. v. Boorman et al.*, 15 F. (2d) 35 (C. C. A. 7).

VII.

The District Court's Findings, Amply Supported by the Evidence, Should Have Been Followed and Adopted, and Not Disregarded by the Court of Appeals.

Adamson v. Gilliland, 242 U. S. 350; Rule 52 (a), Rules of Civil Procedure.

VIII.

Infringement Not Avoided by Copying Indirectly or Copying from a Copyist.

American Press Ass'n v. Daily Story Pub. Co., 120 Fed. 766 (C. C. A. 7); Amdur, Copyright Law and Practice (1936 Edition), page 688, Section 20; *Schumacher v. Schwencke*, 30 Fed. 690, 691 (D. C. N. Y.); *Gross, et al. v. Seligman, et al.*, 212 Fed. 930, 931 (C. C. A. 2).

CONCLUSION.

On the grounds and for the reasons set forth, we urge that the writ of certiorari requested be granted.

Respectfully submitted,

CLARENCE J. LOFTUS,

JOHN M. MASON,

Counsel for Petitioner.

October 20, 1945.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 552

THE OFFICIAL AVIATION GUIDE COMPANY, INC.,
Petitioner,
vs.

AMERICAN AVIATION ASSOCIATES, INC., WAYNE
W. PARRISH, H. D. WHITNEY AND THOMAS E.
LINDSEY,

Respondents:

RESPONDENTS' REPLY TO THE PETITION
FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.

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RESPONDENTS' REPLY TO THE PETITION
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SUPPORTING BRIEF.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents will treat the petition for certiorari and supporting brief in sections and paragraphs identified by words or figures used in the petition for certiorari and in the supporting brief.

The term "*Guide*" identifies petitioner's publication, *The Official Guide of the Airways*; "*Schedules*" identifies respondents' publication, *Universal Airline Schedules*; "airline listing" identifies those pages or parts of a page of either publication devoted to the time tables, fare tables and information of a single airline and for which the airline paid the publisher a rate per page; "promotional advertising" identifies those pages paid for by the airlines at a rate lower than the listing pages be-

cause the airlines furnished a plate; "source material" identifies the copy, whatever its form, which constituted the ultimate source for the publisher of what he actually printed; "publisher's material" identifies those portions of either publication as published for which no third party paid a fee,—i.e., pages published at the expense of the publisher.

I.

Jurisdiction.

(*Petition, page 2*)

The statements as to jurisdiction appear to be correct.

II.

Questions Presented.

(*Petition, page 2*)

None of the nine questions listed in the petition for certiorari succinctly states a question of law decided by the Circuit Court of Appeals.

Question 1: The Circuit Court of Appeals did not deny that the component parts of petitioner's publication were the subject of copyright. On the contrary, that court assumed that the copyright on petitioner's magazine covered the component parts, namely, the airline listings, maps, indices and the like, and then held that in view of the airlines' compensating the *Guide* for editorial work done on their listing pages at a rate of about \$4.00 a page per issue, the airlines were the equitable owners of any copyright on their own *Guide* listings and could authorize another publisher to reproduce them R627, 629. The Circuit Court of Appeals decided petitioner's first question exactly as petitioner asks this court to decide it.

Question 2: The Circuit Court of Appeals did not disregard petitioner's alleged rule as to what constitutes copyright infringement, but on the contrary said at R628:

“The similarity of treatment in the two magazines springs from the similarity of source material and type of information to be presented. That coincidence of treatment which merits a valid charge of infringement does not exist.”

If the cases cited in petitioner's second question do establish petitioner's alleged rule, still they merely set up a *prima facie* case which can be rebutted by inspection of common source material.

Question 3: Respondents' remarks as to Question 2 apply equally to Question 3.

Question 4: The findings of fact are not entitled to the benefits of Rule 52(a) because petitioner based these findings on a memorandum opinion rendered by the trial judge prior to his having read respondents' ten depositions, which constitute almost half of the testimony taken in the case,—see full explanation hereafter on pages 12 to 14. These findings of fact are so incomplete that they make no mention of the airlines' paying for their listings in petitioner's *Guide* or the airlines' participation as authors in creating their own *Guide* listing pages.

Question 5: Respondents fail to perceive the pertinency of Section 41 of the Copyright Act to the case at bar.

Question 6: The Circuit Court of Appeals did not hold, and respondents do not contend, that the airlines' right to have other publishers reproduce their *Guide* listings gives to the airlines any right whatsoever in the petitioner's publisher's material, that is the material which is not paid for by the airlines, such as indices and maps. As for the style, garb, expression and arrangement of any given listing, the Circuit Court of Appeals found that those elements in the petitioner's *Guide* were sufficiently different from those elements in the respondents' *Schedules* as to negative copying, R625.

Question 7: Respondents can see no difference in substance between this question and Question 6.

Question 8: The Circuit Court of Appeals did not overlook the pertinent decisions of this and other courts, but relied on *Perris v. Hexamer*, 99 U. S. 674, *Lamb v. Evans*, 1 Ch. Div. 218 (Law, 1893); cf. *Brown v. Mollé Company*, 20 F. Supp. 135; *Yardley v. Houghton Mifflin Co.*, 108 F. 2d 28, and *Grant v. Kellogg Co.*, 58 F. Supp. 48, which petitioner has failed to mention in either its petition or supporting brief.

Question 9: The statement "where copying is found and admitted" is too general to be of value. The respondents have denied at all times that the respondents did any copying. The respondents asked the airlines for original copy, and they received from the airlines what appeared to be original copy. In the case of three or four airlines, study of their apparently original copy, —after the institution of this suit and after the material had been thrown open to the petitioner for inspection, showed that certain airlines had probably copied parts of their listings in the *Guide*. Also, petitioner's statement that "There is no proof that either the publication as a whole or the copyrightable component parts asserted were in the public domain," overlooks the fact that the depositions contain several statements by those airline representatives that sent the source material to petitioner's *Guide* for publication, that they, the airline representatives, prepared the material, R181, 197-8, 206, 242, 291, 325, and overlooks the testimony of Nels Fry, with convincing supporting documentary proof, that not one word or figure in the United Airlines listing for several preceding years in the *Guide* had been created by the *Guide's* employees, but solely by United Airlines, R425-434. This testimony is clearly sufficient to return the burden of going forward to the petitioner to show that the petitioner originated the style, garb, arrangement, expression and contents of the airline listings, the component parts of the petitioner's *Guide*.

This burden petitioner refused to meet by failing to introduce any of the source material that the *Guide* had received from the airlines, although its editor Chase admitted that petitioner had the material, R371.

III.

Summary and Short Statement of the Matters Involved.

(*Petition, page 5*)

Respondents doubt that the contents of the petition on pages 5 to 10 will give a reader any sort of a clear picture of this copyright suit, particularly in view of the fact that the reviewing justices will not have copies of at least one issue of each of the two publications. Respondents would give the court copies of the accused publication if they had them, but after the trial judge's decree ordering that all copies be destroyed, respondents did not post a supersedeas bond, and consequently, had to submit to the destruction of some \$8,000 worth of plates and type and all of the copies of their publication. Respondents believe that the Circuit Court of Appeals decision states the facts very succinctly, and respondents only submit the following statement of facts because they are specifically drawn so that the controversy may be understood without seeing the two publications.

Briefly, the situation is this. Respondents tried to purchase petitioner's publication and failed. The respondents then proceeded with their own publication and recognizing that these negotiations made it imperative that the public be given no cause for confusing their new publication with petitioner's publication, adopted a bright red cover to contrast with petitioner's bright blue cover, and adopted the name "Schedules", whereas all similar publications use the word "Guide", i.e., *Railway Guide*, *Bus Guide*, *Steamship Guide*, and petitioner's *Official*

Guide. In order further to avoid a controversy with the petitioner, respondents asked all airlines to send original, listing, source material for respondents' first issue of the accused *Schedules*, R534. Additionally, respondents had an employee make original India ink maps on tracing paper, three by four feet, for conversion into printing plates, Ex. Maps E, R511, G, R513, H, R518, J, R517, and L, R515.

After institution of this suit, and several months before trial, all of this material, including the maps, were shown to petitioner, R81-84, 94. This source material is approximately 85 per cent complete for the airline listings and 95 per cent complete for the publisher's material (Ex. M, R452). Upon careful inspection of this material, it was found that portions of the source material sent by three or four airlines were apparently copied by employees of those airlines from their respective listings in petitioner's *Guide*. This fact, coupled with the unavoidable similarity of time tables and fare tables, created a general similarity between the two publications. *This similarity arises solely from the airline listings, for comparison of the publisher's material shows such differences in arrangement and in style and garb as to negate any copying.*

The controversy became one as to whether respondents should be punished for acts of copying committed by the airline advertisers, and hence respondents directed their case to a showing that the listings in the plaintiff's *Guide* were merely advertisements paid for at a page rate, which rate included an additional charge for any supervisory work that the *Guide* might perform. For a reason that is not clear, the trial judge apparently failed to see the issue. He did not mention it in either of his opinions, although squarely pleaded, R54, and neither the findings of fact nor the conclusions of law make any mention of it.

At this page is inserted a planograph foldout which relates to the first listing page in petitioner's March, 1943

NORTHWEST AIRLINES INC.

U.S. AIRMAIL EXPRESS PASSENGER SERVICE

EXECUTIVE OFFICES
ST. PAUL MUNICIPAL AIRPORT
SAINT PAUL, MINNESOTA

February 24, 1943

Mr. H.D. Whitney
Asst Managing Editor
Universal Airline Guide
139 North Clark Street
Chicago, Illinois

Dear Whit:

I am attaching herewith some very rough suggested layouts for listing in the Universal Airline Guide. I have designated these pages as A, B, C, and D and request that they appear in the Guide in this order.

There will be a fifth page which will be entirely promotional, and a copy of this will be forwarded you direct by our Advertising Agents.

With reference to page B attached, immediately under the Flight No. will you insert the word "daily", and if you find there is space enough we would also like at the bottom of the page the phrase "All Flights Daily", in fairly bold type.

I hope you can read the hen scratching for the connecting tables, and I must admit they appear to be a little cockeyed.

There is to be some air mail and express promotional copy for the bottom of page D, and this also will be sent to you direct by our Advertising Agents.

Top and bottom cut lines for pages A, B, C, and D are also being prepared and will be shipped you as soon as possible.

Please let me know if you find any glaring mistakes as this stuff is pretty rough and may look considerably different when actually set up.

Very truly yours,

Sam Myrland
Chief Clerk - Traffic

ST:ep

Enc.

SAWFLY

CHICAGO-TWIN CITIES-SPOKANE-PORTLAND-SEATTLE-VANCOUVER

WESTBOUND

November 1, 1942

	Flt 1	Flt 3	Flt 11	Flt 15	Flt 5
	PM	PM	A	PM	PM
1. Boston (?)	8:40	9:40	5:50	12:30	3:45
1. New York (?)	11:59	12:30	8:30	3:45	5:40
1. Washington (?)	7:40	8:55	7:00	11:40	5:40
1. Pittsburgh (?)	11:23	3:20	11:45	3:45	17:37
1. Detroit (?)	3:40	4:50	11:27	5:17	8:57
1. CHICAGO (CWT)	9:30	10:30	11:30	5:30	10:40
1. MILWAUKEE	9:30	10:30	11:30	5:30	10:40
1. MADISON	9:30	10:30	11:30	5:30	10:40
1. ROCHESTER, Minn.	9:30	10:30	11:30	5:30	10:40
1. ST. PAUL	9:30	10:30	11:30	5:30	10:40
1. MINNEAPOLIS (Twin Cities Airport)	9:30	10:30	11:30	5:30	10:40
1. FARGO	9:30	10:30	11:30	5:30	10:40
1. BISMARCK	9:30	10:30	11:30	5:30	10:40
1. SIOUX CITY (NWT)	9:30	10:30	11:30	5:30	10:40
1. BILLINGS	9:30	10:30	11:30	5:30	10:40
1. SULLY	9:30	10:30	11:30	5:30	10:40
1. GREAT FALLS	9:30	10:30	11:30	5:30	10:40
1. MONTANA	9:30	10:30	11:30	5:30	10:40
1. BUTTE	9:30	10:30	11:30	5:30	10:40
1. SPOKANE (NWT)	9:30	10:30	11:30	5:30	10:40
1. SPOKANE (PWT)	9:30	10:30	11:30	5:30	10:40
1. SPOKANE	9:30	10:30	11:30	5:30	10:40
1. SEATTLE (PST)	9:30	10:30	11:30	5:30	10:40
1. VANCOUVER (PWT)	9:30	10:30	11:30	5:30	10:40
1. PORTLAND, Ore.	9:30	10:30	11:30	5:30	10:40

EASTBOUND

November 1, 1942

	Flt 2	Flt 10	Flt 12	Flt 13	Flt 6
1. PORTLAND, Ore.	8:00	8:00	10:00	10:00	10:00
1. VANCOUVER (PWT)	8:00	8:00	10:00	10:00	10:00
1. SEATTLE (PWT)	8:00	8:00	10:00	10:00	10:00
1. SPOKANE (PWT)	8:00	8:00	10:00	10:00	10:00
1. SPOKANE (NWT)	8:00	8:00	10:00	10:00	10:00
1. BUTTE	8:00	8:00	10:00	10:00	10:00
1. GREAT FALLS	8:00	8:00	10:00	10:00	10:00
1. SULLY	8:00	8:00	10:00	10:00	10:00
1. SIOUX CITY (NWT)	8:00	8:00	10:00	10:00	10:00
1. BISMARCK (NWT)	8:00	8:00	10:00	10:00	10:00
1. FARGO	8:00	8:00	10:00	10:00	10:00
1. SPOKANE (PWT)	8:00	8:00	10:00	10:00	10:00
1. BUTTE	8:00	8:00	10:00	10:00	10:00
1. SPOKANE (PWT)	8:00	8:00	10:00	10:00	10:00
1. SPOKANE	8:00	8:00	10:00	10:00	10:00
1. SEATTLE (PST)	8:00	8:00	10:00	10:00	10:00
1. VANCOUVER (PWT)	8:00	8:00	10:00	10:00	10:00
1. PORTLAND, Ore.	8:00	8:00	10:00	10:00	10:00

Ar. Detroit (?) 3:25 2:30 2:30 11:30 11:30
 Ar. Pittsburgh (?) 3:25 2:30 2:30 11:30 11:30
 Ar. Washington ? 3:25 2:30 2:30 11:30 11:30
 Ar. New York ? 3:25 2:30 2:30 11:30 11:30
 Ar. Boston ? 3:25 2:30 2:30 11:30 11:30
 AM PM PM PM PM

CHICAGO-MILWAUKEE-MINNEAPOLIS-ST. PAUL

November 1, 1942

	Flt 1	Flt 3	Flt 11	Flt 15	Flt 5
1. CHICAGO (CWT)	9:30	10:30	11:30	5:30	10:40
1. MILWAUKEE	9:30	10:30	11:30	5:30	10:40
1. MADISON	9:30	10:30	11:30	5:30	10:40
1. ROCHESTER, Minn.	9:30	10:30	11:30	5:30	10:40
1. ST. PAUL	9:30	10:30	11:30	5:30	10:40
1. MINNEAPOLIS (Twin Cities Airport)	9:30	10:30	11:30	5:30	10:40

November 1, 1942

	Flt 2	Flt 10	Flt 12	Flt 13	Flt 6
1. MINNEAPOLIS	8:00	8:00	10:00	10:00	10:00
1. ST. PAUL	8:00	8:00	10:00	10:00	10:00
1. ROCHESTER, Minn.	8:00	8:00	10:00	10:00	10:00
1. MADISON	8:00	8:00	10:00	10:00	10:00
1. MILWAUKEE	8:00	8:00	10:00	10:00	10:00
1. CHICAGO (CWT)	8:00	8:00	10:00	10:00	10:00

SEATTLE-SPOKANE

November 1, 1942

Flt 3	Flt 5	Flt 11	Flt 15	Flt 6
9:30	10:30	11:30	5:30	10:40
1. SPOKANE (PWT) Ar	9:30	10:30	11:30	5:30
1. SEATTLE (PWT) Ar	9:30	10:30	11:30	5:30

TWIN CITIES-DULUTH-SUPERIOR

November 1, 1942

Flt 01	Flt 02
9:30	10:30
1. MINNEAPOLIS-ST. PAUL (Twin Cities Airport)	9:30
1. DULUTH-SUPERIOR	9:30

CHICAGO-TWIN CITIES-FARGO-WINNED

November 1, 1942

Flt 1	Flt 2	Flt 3	Flt 4	Flt 5
9:30	10:30	11:30	5:30	10:40
1. CHICAGO (CWT) Ar	9:30	10:30	11:30	5:30
1. MILWAUKEE (PWT) Ar	9:30	10:30	11:30	5:30
1. MADISON (PWT) Ar	9:30	10:30	11:30	5:30
1. ROCHESTER, Minn. (PWT) Ar	9:30	10:30	11:30	5:30
1. ST. PAUL (PWT) Ar	9:30	10:30	11:30	5:30
1. MINNEAPOLIS (Twin Cities Airport) (PWT) Ar	9:30	10:30	11:30	5:30
1. FARGO (PWT) Ar	9:30	10:30	11:30	5:30
1. WINDYBUSH (PWT) Ar	9:30	10:30	11:30	5:30

For reference marks see page 1

CHON HUNTER, President and Gen. Mgr.
E. I. WHYATT, Vice President and Treasurer
K. R. FERGUSON, Vice President Operations
A. E. FLOAN, Secretary

EASTERN

	Flight 7	Flight 10	Flight 12	Flight 15
L. PORTLAND, OR.	5	10	10	5
L. VANCOUVER (PWT)		10 30		
L. SEATTLE (PWT)	5 00	9 30		
L. SPOKANE (PWT)	1 45	9 30		
L. SPOKANE (MWT)	11 30	10 30		
L. BUTTE	1 30			
L. HOUSTON		1 30		
A. GREAT FALLS		1 30		
A. BILLINGS	2 15	1 30		
A. BILLINGS	3 30	2 30		
L. SPOKANE CITY	3 30	3 30		
L. SPOKANE (MWT)	4 15			
A. FARGO		7 30		
A. FARGO		7 45		
L. INDIANAPOLIS	9 30	9 30		1 30
L. ST. LOUIS	10 30	10 30	4 30	1 30
L. (To Chicago Airport)		9 30		1 30
L. INDIANAPOLIS	10 30			1 30
L. INDIANAPOLIS	11 30	11 30	11 30	7 30
A. CHICAGO (MWT)				

Ar. Detroit (1)	325	235	235	1130	1130
Ar. Pittsburgh (1)	325	329	329	125	125
Ar. Washington	354	354	354	125	550
Ar. New York	354	354	354	354	354
Ar. Boston	354	354	354	354	354

November 1, 1962		Flight 1	Flight 2	Flight 3	Flight 4	Flight 5
INDIANAPOLIS		00	00	00	00	00
1x	ST. PAUL (Van Cise Airport)	00 00	00 00	00 00	00 00	00 00
1x	ROCKFORD, Illinois	00 00		00 00		
1x	MADISON				00 00	
1x	MILWAUKEE			00 00	00 00	00 00
1x	CHICAGO	(11 00)	11 00	00 00	00 00	00 00

Flight 1	November 1, 1942	Flight 2
10	1-0 CHICAGO	1-0
10 30	1-0 ST. LOUIS	1-0
11 00	1-0 BOSTON	1-0
11 30	1-0 NEW YORK	1-0
12 00	1-0 NEW YORK, Wash.	1-0
12 30	1-0 ST. PAUL	1-0
13 00	1-0 INDIANAPOLIS	1-0
13 30	1-0 (Train to leave Wash.)	1-0
14 00	1-0 WASH.	1-0
14 30	1-0 WASH.	1-0
15 00	1-0 WASH.	1-0
15 30	1-0 WASH.	1-0
16 00	1-0 WASH.	1-0
16 30	1-0 WASH.	1-0
17 00	1-0 WASH.	1-0
17 30	1-0 WASH.	1-0

For reference marks see page

WESTBOUND

70

April 1, 1947

[illegible]

Condensed Table

April 1, 1941

		AM	AM	PM	PM	PM
CHICAGO	(CT) Lv	5:00	7:30	10:30	10:15	10:15
MILWAUKEE	Ar	5:40	-	-	10:15	-
MADISON (A)	Ar	-	-	-	-	-
ROCHESTER, Minn.	Ar	7:40	-	-	-	-
ST. PAUL	Ar	8:20	9:55	11:15	12:25	12:40
MINNEAPOLIS	(CT)	AM	AM	PM	AM	AM

Cardboard Value

Order	Order
-------	-------

April 1, 1948

AM	PM		AM	PM
8:45	7:00	SPokane (PT)	9:40	8:00
10:40	9:00	Seattle (PT)	9:00	8:15

72

MAN AND EXTERNAL ONLY

April 1, 1941

AM		PM
9 35	MINNEAPOLIS	9 00
11 20	ST. PAUL	10 00
	DULUTH-SUPERIOR	

FOR EXPLANATION OF REF.

SCHEDULES LISTING
FOLLOW THE STYLE
GUIDE LISTING

SCHEDULES LISTING PAGES DO NOT
FOLLOW THE STYLE AND GARB OF
GUIDE LISTING PAGES.

1. Schedules show upper, outer corner, whereas Guide shows airline code.
2. Schedules use logotype for heading, whereas Guide frequently uses type.
3. Schedules table headings are in boldface caps, whereas, Guide uses upper and lower case.
4. Schedules show direction of flight, which Guide omits.
5. Schedules give first airline table a number which is multiple of five, whereas, Guide numbers them consecutively.
6. Schedules places off-line cities in lightface caps, whereas, Guide uses boldface.
7. Schedules show effective date in upper and lower case, whereas, Guide uses caps.
8. Schedules use a lighter face type to distinguish a.m. times.
9. Schedules does not number intermediate or connecting schedules, whereas, Guide does.
10. Schedules show mileage in both directions on principal tables, whereas, Guide shows only one.
11. Schedules show its name on each page.

NORTHWEST AIRLINES

Shortest, fastest between Chicago and Seattle



CROH. HUNTER, President and General Manager.
E. L. WHYATT, Vice President and Treasurer.
R. R. PERDUE, Vice President Operations.

MEMBER—AIR TRAFFIC CONFERENCE OF AMERICA
EXECUTIVE OFFICES—288 UNIVERSITY AVENUE, ST. PAUL, MINN.
A. E. FLOAN, Secretary.
R. L. SMITH, Operations Manager.
A. G. KIRSMAN, General Traffic Manager.

F. R. ERICKSON, Manager Air Mail and Express.
JOSEPH A. FERRIS, Director of Public Information.

Chicago-Twin Cities-Spokane-Portland-Seattle

1 FEB. 16, 1943

	1	11	2	16	8
	Daily	Daily	Daily	Daily	Daily
BOSTON (1).....(RT) to	9:00	4:50	9:00	7:10	9:00
NEW YORK (1).....to	11:00	8:30	12:30	4:40	10:00
WASHINGTON (1).....to	8:00	9:00	11:00	1:00	7:00
PITTSBURGH (1).....to	11:00	11:00	3:20	4:00	7:00
DETROIT (1).....(RT) to	5:04	11:27	4:54	6:07	8:07
CHICAGO.....(RT) to	0 05	00 11	30 07	30 10	19 15
MILWAUKEE.....to	5 50	-	-	10 11	-
MADISON (X).....to	7 45	-	-	-	-
ROCHESTER, Minn.....to	7 45	-	-	-	-
ST. PAUL.....to	8 30	3 00	9 50	12 30	12 40
MINNEAPOLIS.....to	8 30	3 00	10 10	12 50	-
Twin Cities Airport.....to	8 30	3 00	10 10	12 50	-
FARGO.....to	10 15	-	11 50	2 30	-
BISMARCK.....to	10 15	-	12 00	2 40	-
SPOKANE.....to	8 04	-	1 30	4 10	-
MILES CITY (MT) to	10 15	-	-	-	-
BILLINGS.....to	11 07	-	-	5 52	-
WALLINGFORD.....to	11 07	-	-	5 52	-
*GREAT FALLS.....to	11 07	-	-	5 52	-
*GREAT FALLS.....to	11 07	-	-	5 52	-
HELENA.....to	11 07	-	-	5 52	-
BUTTE.....to	11 07	-	-	5 52	-
MISSOULA (MT) to	11 07	-	-	5 52	-
SPOKANE (FT) to	11 07	-	-	5 52	-
SPOKANE.....to	11 07	-	-	5 52	-
SEATTLE.....to	19 15	-	-	-	-
VANCOUVER (1).....(FT) to	AM	PM	10 17	4 40	-
PORTLAND (1).....to	AM	PM	11 17	5 40	-

FEBRUARY 16, 1943

	2	16	6	12	8
	Daily	Daily	Daily	Daily	Daily
PORTLAND (1).....to	AM	AM	PM	PM	PM
VANCOUVER (1).....(FT) to	AM	AM	PM	PM	PM
SEATTLE.....to	AM	AM	PM	PM	PM
SPOKANE.....to	AM	AM	PM	PM	PM
MISSOULA.....(FT) to	AM	AM	PM	PM	PM
BUTTE.....to	AM	AM	PM	PM	PM
HELENA.....to	AM	AM	PM	PM	PM
*GREAT FALLS.....to	AM	AM	PM	PM	PM
*GREAT FALLS.....to	AM	AM	PM	PM	PM
BILLINGS.....to	AM	AM	PM	PM	PM
BILLINGS.....to	AM	AM	PM	PM	PM
MILES CITY (MT) to	AM	AM	PM	PM	PM
BISMARCK.....to	AM	AM	PM	PM	PM
FARGO.....to	AM	AM	PM	PM	PM
MINNEAPOLIS.....to	AM	AM	PM	PM	PM
ST. PAUL.....to	AM	AM	PM	PM	PM
Twin Cities Airport.....to	AM	AM	PM	PM	PM
ROCHESTER, Minn.....to	AM	AM	PM	PM	PM
MADISON (X).....to	AM	AM	PM	PM	PM
MILWAUKEE.....to	AM	AM	PM	PM	PM
CHICAGO.....(CT) to	AM	AM	PM	PM	PM
DETROIT (1).....(RT) to	AM	AM	PM	PM	PM
PITTSBURGH (1).....to	AM	AM	PM	PM	PM
WASHINGTON (1).....to	AM	AM	PM	PM	PM
NEW YORK (1).....to	AM	AM	PM	PM	PM
BOSTON (1).....(RT) to	AM	AM	PM	PM	PM

Chicago-Minneapolis-St. Paul

1a NOVEMBER 1, 1942

	1	11	2	16	8
	Daily	Daily	Daily	Daily	Daily
CHICAGO.....(CT) to	5 00	1 30	7 30	10 15	1 30
MILWAUKEE.....to	5 00	-	-	10 15	-
MADISON (X).....to	7 45	-	-	-	-
ROCHESTER, Minn.....to	7 45	-	-	-	-
ST. PAUL.....(CT) to	8 30	3 00	9 50	12 30	12 40
MINNEAPOLIS.....to	8 30	3 00	9 50	12 30	12 40
Twin Cities Airport.....to	8 30	3 00	9 50	12 30	12 40

NOVEMBER 1, 1942

	2	16	6	12	8
	Daily	Daily	Daily	Daily	Daily
MINNEAPOLIS.....to	AM	AM	PM	PM	PM
ST. PAUL.....(CT) to	AM	AM	PM	PM	PM
Twin Cities Airport.....to	AM	AM	PM	PM	PM
ROCHESTER, Minn.....to	AM	AM	PM	PM	PM
MADISON (X).....to	AM	AM	PM	PM	PM
MILWAUKEE.....to	AM	AM	PM	PM	PM
CHICAGO.....(CT) to	AM	AM	PM	PM	PM

Seattle-Spokane

	1	2	3	4
	Daily	Daily	Daily	Daily
SEATTLE.....to	AM	PM	AM	PM
SPOKANE.....(FT) to	AM	PM	AM	PM
SEATTLE.....(FT) to	AM	PM	AM	PM

Minneapolis-St. Paul-Duluth-Superior

	1	2	3	4
	Daily	Daily	Daily	Daily
MINNEAPOLIS-ST. PAUL.....to	AM	PM	AM	PM
DULUTH-SUPERIOR.....to	AM	PM	AM	PM

Chicago-Twin Cities-Winnipeg

	1	2	3	4
	Daily	Daily	Daily	Daily
CHICAGO.....to	AM	PM	AM	PM
MINNEAPOLIS.....(CT) to	AM	PM	AM	PM
ST. PAUL.....to	AM	PM	AM	PM
Twin Cities Airport.....to	AM	PM	AM	PM
ROCHESTER.....to	AM	PM	AM	PM
ST. PAUL.....to	AM	PM	AM	PM
MINNEAPOLIS.....to	AM	PM	AM	PM
FARGO.....to	AM	PM	AM	PM
GRAND FORKS.....to	AM	PM	AM	PM
WINNIPEG.....(CT) to	AM	PM	AM	PM

FOR EXPLANATION OF REFERENCE MARKS, SEE PAGE 27

DIRECT ROUTE BETWEEN MAJOR DEFENSE CENTERS



Guide, Ex. 3, and to the corresponding page in respondent's first accused edition for April, 1943, Ex. F. What this foldout establishes as to this one page is typical of all listing pages in both publications, for this foldout could be duplicated by other foldouts made from the material in Ex. M for almost every other page of petitioner's publication. Referring to this foldout, the first page is a letter received from Northwest Airlines. The second page is the copy "A" (source material) sent by the airline to respondents and mentioned in the letter. This source material is in Ex. M and bears number M-51 and examination of the original shows that the printed matter in the boxes are clippings from the regular Northwest Airlines public time table folder. The third page is the page in respondents' *Schedules* which resulted from the letter and the source material "A". The fourth page is a list of elements of style and garb with arrows pointing to the third page, and the fifth page, which latter is the first page of time tables in the petitioner's March, 1943, *Guide*, Ex. 3.

This planograph tells the whole story. Firstly, it shows that the respondents did no copying themselves. Secondly, it shows that Northwest may have copied the hand written material, at least in part, from its own listing in the *Guide*. Thirdly, it suggests that at some date years ago, the *Guide* probably copied everything on its page from some material submitted by the airline. Fourthly, it shows that the only elements that constitute style, garb and arrangement are different in respondents' publication than in petitioner's publication. The only thing that a comparison of these pages does not show is the fact that the *Guide* was paid \$4.00 a page for whatever arranging and editing of Northwest Airlines listing pages it might have performed (Ex. GGGG, page 1, last three lines; R362, C. C. A. opinion, R630).

In order to prevail on the listing pages, petitioner is obliged to contend that an airline cannot have a second publisher reproduce its own advertisement appearing in a first publication even though

- (a) the airline paid the first publisher separately to prepare it;
- (b) paid the first publisher to publish it; and
- (c) contributed most of the creative effort in creating the advertisement.

This proposition is so unsound that it would never have been asserted in a Circuit Court of Appeals but for the fact that a trial judge ignored it. The Circuit Court of Appeals disposed of it, R626 to 628 and R629 to 630.

The only other possible controversy that can arise in this case relates to the publisher's material. This controversy stems from the fact that the respondents' *Schedules* utilizes a numbering system by which the tables are keyed to both indices and maps. This is an idea. This controversy cannot extend to more than the idea,—that is to copying of maps or indices because the large tracing paper maps, Exs. Maps E, G, H, J and L, of which respondents' published maps are reductions, are in evidence, and secondly, because respondents' arranging its listings alphabetically and respondents' giving to the first table of each listing a number that was a multiple of five, had the unavoidable effect of making respondents' indexing and map making problems entirely original. Petitioner's case on the publisher's material, therefore, reduces itself to a contention that petitioner has the exclusive right to the idea of, or to a "model", keying maps and indices to time tables. Only one decision is needed to answer this, namely, *Perris v. Hexamer*, 99 U. S. 674, which petitioner does not mention although it was relied upon by the Circuit Court of Appeals.

IV.

Reasons for Granting the Writ.*(Petition, page 10)*

Rule of this court 38, Paragraph 5(b), sets forth five reasons which, while not all inclusive, will be considered as grounds for granting a petition for certiorari. Petitioner presents ten reasons, not one of which is sufficiently definite for respondents to learn exactly why the merits of this case should be reargued for the third time, or why the exhibits and testimony which can only fairly be appraised by a careful study of thousands of pages of printed matter, should again be reviewed.

Reasons 1, 7, 8, 9 and 10: These reasons are not sufficiently specific to enable respondents to reply to them.

Reason 2: The Circuit Court of Appeals decision, far from being arbitrary, indicates that some judge, presumably Judge Kerner, made a very careful study of the voluminous Ex. M, consisting of 1,700 bits of paper, and some 20 or more issues of the two publications, each consisting of 150 pages.

Reason 3: This reason is based upon a controversy of fact which the Circuit Court of Appeals resolved against petitioner. Petitioner failed to offer in evidence the source material which the airlines had submitted for the *Guide's* listing pages, although petitioner's editor admitted that petitioner had the material (R371). When the airline representatives state that they created the *Guide* listings by sending in source material, R181, 197-8, 206, 242, 291, 325, it behooves petitioner to produce the material to show that they are wrong.

Reason 4: All tests as to what constitutes copying are rebuttable and the Circuit Court of Appeals decision turns

on the disposition of respondents' material, Ex. M, offered in rebuttal.

Reason 5: The Circuit Court of Appeals did not deny that copyright on a publication covered its component parts, including both the airline listings, and the publisher's material such as maps, etc. As to the airline listings, the Circuit Court of Appeals held that the airlines had a right to authorize others to republish their listings. As to the publisher's material, that court held that this material in respondents' *Schedules* was not sufficiently like that in the petitioner's *Guide* to warrant an inference of copying.

Reason 6: The Circuit Court of Appeals did not hold that the airlines could authorize respondents' *Schedules* to clothe the airline listings in the same "layout, expression, style and garb" as employed by petitioner's *Guide* for a corresponding listing. It held that the layout, expression, style and garb in respondents' *Schedules*, were not similar to those elements in the *Guide*, R625. The controversy raised by this reason is essentially a fact controversy determinable only by careful study of the exhibits, and presents no new application of legal principles.

In conclusion, the essential problem involved in the case is a fact one, namely, are the publications sufficiently similar in view of the common source of all the material appearing in the publication, to warrant an inference that the respondents did any copying.

BRIEF.*(Petition, page 13)***General Statement by Respondents.**

Respondents believe that the following is a fair general comment on the petition for certiorari and supporting brief.

Petitioner asks this court to review the testimony and to compare thousands of pages of exhibits to determine the soundness of the facts found by the Circuit Court of Appeals, and petitioner does not raise clearly one question of law for consideration by this court. Petitioner says that the Circuit Court of Appeals "was not only confused as to the issues, but being so confused, disregarded the facts and the law applicable to the *real* issue", (Petition, page 18).

A comparison of the Circuit Court of Appeal's decision with the issues raised in the pleadings should convince anyone that it understood the issues raised by the pleadings because it very carefully disposed of them all. It is true that the Circuit Court of Appeals made its own findings of fact which are not in accord with the lower court's findings of fact or memorandum opinion. One may assume that the court did this reluctantly for the job could only be performed by a detailed study of thousands of pages of exhibits, and that the court did this only because of some circumstance which cast such doubt upon the correctness of the findings of fact as to render such reconsideration necessary.

The circumstance which threw heavy doubt upon the trial judge's findings of fact and conclusions of law was this. At the opening of respondents' case at the trial, the respondents offered in evidence the depositions of representatives of ten of the seventeen major United States airlines, R421. Respondents took these ten depositions for two purposes:

Firstly, to establish the authenticity of the source material sent by the airlines to the respondents for their first accused issue of *Schedules* and found in Ex. M; and

Secondly, to shift the burden of going forward from themselves to the petitioner on the issue concerning who was the author of the airline listing pages in the petitioner's *Guide*.

The trial judge received the depositions as evidence, R422. On June 29, 1944, the trial judge found for the petitioner, R568, and asked the petitioner to prepare findings of fact, conclusions of law, and a decree, R572, saying at R571:

"Such common errors were likewise proved in the instant case and although in this case an explanation for such common errors was offered which was not true in the case before Judge Evans, nevertheless the explanation when considered in the light of all the testimony and a review of the exhibits fails to convince me of its genuineness."

On July 7, 1944, petitioner filed its findings of fact, conclusions of law and proposed decree, R573. On July 25, 1944, respondents discovered that the seals on the depositions remained unbroken. They were opened as of that date, R111, 165, 341. On July 27, 1944, respondents invited the judge's attention to this fact, R574. On September 27, 1944, in a supplemental opinion, R577, the judge stated that he had "not considered prior to the court's memorandum of June 29, 1944" these depositions, but he still found for the petitioner, and signed the findings of fact, conclusions of law, and decree in the exact form submitted by the petitioner on July 7th, with the exception of two words relating to the domicile of one of the respondents. He said at R578:

"Having fully considered the source material itself prior to filing the memorandum of June 29, any ulti-

mate facts contained in said depositions were fully before the court at that time."

Nothing was said about authenticity or genuineness.

The two statements of the trial judge cannot be reconciled. After deciding for the petitioner on the ground that the respondents' source material was not genuine, he forgot the basis of his decision when he read the depositions relied upon by the respondents to establish the genuineness of the source material.

Perhaps a second circumstance influenced the Circuit Court of Appeals to re-examine the evidence in this case. The final decree prepared by petitioner and signed by the trial judge granted a perpetual injunction against the respondents from publishing "defendants' infringing publication entitled 'Universal Airline Schedules' represented in evidence as plaintiff's exhibits 7, 8, 9 and 10, or any publication like or similar thereto * * *", R589. A short appeal was taken within 36 hours of the entry of this decree, R591, and after motion was made, petitioner stipulated to strike out the words "or any publication like or similar thereto", R.607. The decree prepared by the petitioner and signed by the trial court so clearly violates not only established copyright law and federal statutes as to definiteness of a decree, but fairness itself. It is little wonder that the Circuit Court of Appeals felt that the case had to be re-examined *in toto*.

There is one other circumstance which made it necessary for the Circuit Court of Appeals to find the critical facts, namely, the complete failure of the findings of fact to mention Ex. M or the fact that the listing pages are nothing but advertisements because they are paid for by the airlines at a rate per page. Without ascertaining the facts on these points, it is impossible to dispose of respondents' affirmative defenses set forth in paragraphs 14 and 15 on pages 54 and 55 of the record.

ARGUMENT.

I.

Statement.

(*Petition, page 14*)

As petitioner's statements of fact are not presented in an orderly fashion, but each is repeated many times in this section of petitioner's brief, pages 14 to 23, respondents will select the most prominent for discussion.

In the third paragraph on page 14, there appears:

"The undisputed evidence shows that the publication as a whole was originated and prepared by petitioner through its employees (R64, 67, 68, 355, 360, 393, 394) and that the * * * listing sections were originated and prepared by petitioner's employees. There is not one scintilla of evidence * * * that anyone except petitioner's employees contributed one iota to their production."

As stated heretofore, the only similarity between the two publications which would give rise to an inference of copying resides in the listing pages, for the source material for respondents' publisher's material in the first accused issue of *Schedules*, Ex. 7, is 95% complete, Ex. M, and demonstrates that there could not have been copying. The gravamen of petitioner's complaint, therefore, stems from these listing pages which consists of schedules, fare tables and information supplied by the airlines. While admitting that they got something from the airlines, the petitioner would have one believe that the style, garb, and arrangement of these listing pages was solely the work of petitioner's employees. In support of this, they cite the affidavits of Vincent and A. Cosmas Garvy, R64, 67, and 68, which state that they edited the material and conformed it to the *Guide's* page dimensions, type size,

column and page widths. They additionally rely on the testimony of Chase at R355 and R360 who said that after the facts were received from the airlines, the representatives and employees of the *Guide* "organized it in a garb and style to conform to and which is suitable to the standards of the *Guide*." The testimony of Vincent Garvy at R393-394, was that "when I got the material we compiled it and arranged it, with instructions for the printers how it was to be set up to conform with our style." There is no denial that the *Guide* set the material in common style of type throughout its *Guide*, or at least endeavored to do so, but there is a great deal of controversy as to who organized the material in each *Guide* listing so that it would have a certain arrangement and so that prominence would be given to one schedule over another schedule, etc. If there is anything copyrightable in the listing pages, it resides in this arranging and not in the styles of type which the petitioner happened to find available at its printer's. The depositions contain many statements as to who did this.

Mossman of Pan-American, R181: "We prepared all this. What difference does it make?"

Graham of American Export, R197-8 "Q. * * * whether there was a custom in the airline business * * * in 1943 with reference to the right of an airline * * * to authorize someone else to copy for publication in one magazine the material which it had been running in another publication, which had, in fact, been paid for by the advertiser? A. Yes."

McInerney of K-L-M, R206: "and it is our information that I sent to the Official Aviation Guide. * * *—and I can't understand why, if I am paying for it—if our company is paying for something, I can't permit another company to copy the same thing, because I have no copyright and I can just write any company and tell them they can copy the same thing, because it is my property."

Smith of Northeast, R242: "Q. Prior to the time of typing that, you were familiar with the form

in which fares relating to Northeast Airlines appeared in the March issue of the Official Guide of the Airways, were you not?

"A. Yes, I was, because I prepared that copy" and at R237, he instructed defendants in writing: "If there is any question in your mind as to our desires as to layout and general appearance of Northeast Airlines representation, please refer to our pages in the Official Aviation Guide for March, 1943."

Brinkley of Pennsylvania Central, R291: "I used the style from our timetables and also our other publications because that is the style we desire in all of our advertising in schedules."

Wyman of Northwest, R325: "We have always thought we were free to publish that information in whatever form we wanted in any other guide publication or public time table or any place else we saw fit."

Moreover, at the trial, Nels Fry of United Airlines testified and conclusively proved that everything appearing in the United Airlines listing in the *Guide* for several years prior to the trial of the case was prepared in the exact form in which it was published by United Airlines, R424-435. If the petitioner was right that it created the content, style, garb and arrangement of these airline listings, it had a very simple way of proving it,—it could have introduced the source material delivered to it by the airlines for the *Guide*. This the petitioner could not do, although its editor admitted that he had gone over it, R371. Had they done so, they would have had to put in evidence the same kinds of material that respondents introduced as Ex. M and certainly no one can contend that respondents had any more to do with the style, garb and arrangement of a given airline listing than merely to indicate the sizes and kinds of type.

The evidence is very conclusive that the airlines contributed about 95% of the creative effort expended on

their own published listings in the petitioner's *Guide*. If this court will check the record at the pages referred to in petitioner's brief, pages 19 to 23, it will find that petitioner's statements are not substantiated.

The second factual statement that deserves mention is found on page 16 of the petitioner's brief. It is:

"In view of this and the further facts heretofore pointed out in the petition, it is clear that the respondents used plaintiff's copyrighted publication and the component parts thereof as their model for respondents' publication and its component parts."

Petitioner's meaning is obscure. There is no doubt that both petitioner's *Guide* and respondents' *Schedules* consist primarily of airline listings keyed to maps and indices, with certain airmail and foreign travel information added which petitioner calls the component parts. There is no doubt further that the arrangement of these component parts is different in the two publications,—compare Exs. 3 and 7. The Circuit Court of Appeals relied upon *Perris v. Hexamer*, 99 U. S. 674 as authority that one cannot copyright ideas apart from their embodiment. Petitioners do not discuss the case nor the thought behind it.

A third statement of fact repeated many times relates to the maps. Respondents concede that the maps in the petitioner's publication belong to the petitioner and are properly copyrighted by the petitioner, but they have conclusively proved that similar maps in respondents' *Schedules* were created by respondents. Petitioner can have no monopoly on the idea of keying airline schedules to maps, *Perris v. Hexamer*, 99 U. S. 674. Respondents can create their own maps, even though they show the same territories that petitioner's maps show, and may key them by their own system to the time tables. The map exhibits, Map A to Map R, include three

by four foot tracing paper originals from which the plates for the maps appearing in the accused *Schedules* were prepared by photographing and reducing in size, and they also include the Rand McNally and National Geographic maps from which were traced the coastlines, rivers, boundaries and the location of cities. By superimposing the proper Rand McNally or National Geographic map on the tracing paper original, there can be no doubt where the respondents got their maps. On page 14 of petitioner's brief, petitioner says that the United States map in the August, 1943, *Schedules*, Ex. 26, would "be recognized as being taken from petitioner's." Yet, examining just the top of petitioner's map, one notes that respondents' *Schedules* shows no stop between Winnipeg and Kapuskasing, whereas petitioner's map (see any issue, Exs. 1 to 5) not only shows several stops, but several branch airline routes.

Throughout this portion of its brief, petitioner repeatedly says that the airlines did not pay an advertising rate but "a nominal listing fee." It is immaterial what one calls the money paid by the airlines. The fact is indisputable that the amount of money paid depended upon the number of pages run in the *Guide* and that an additional fee of about \$4.00 was paid per listing page to compensate petitioner for such editorial and typesetting work as it might do. Under these circumstances the Circuit Court of Appeals held that if there was any copyright on the listing pages in the *Guide*, the equitable owner was the airlines who could therefore authorize some other publisher to reproduce the advertisement. The court relied upon *Lamb v. Evans*, 1 Ch. Div. 218 (Law 1893), etc. It is noted that petitioner does not mention these cases in either its petition or its supporting brief.

The statement in petitioner's brief on page 6 that respondents' employees admitted that they copied from

the petitioner's publication is not supported by the record at the pages there cited. In fact, the respondents consistently denied copying, but are inclined to think that in the case of perhaps three or four airline listings, the source material supplied to respondents by those airlines and which appeared to be original, may have been copied in part by those airlines from their listings in the petitioner's publication.

To avoid confusion, Chase was editor of petitioner's *Guide* prior to the spring of 1940, R352. After being out of the guide business for two and one-half years, he was editor of respondents' publication from January 1, 1943 through February 13, 1943, at which time he resigned, R363, 366. His participation in the production of the first accused issue of *Schedules*, Ex. 7, was negligible,—of 1700 pieces of paper in Ex. M, his handwriting appears on not to exceed ten. He was reemployed by petitioner in the fall of 1943 and was petitioner's editor at the time of the trial.

The rule of law laid down in *Bleistein v. Donaldson*, 188 U. S. 239 at page 248, cited on page 15 of the petition, is correct, but does not negative the right of a party to show that equitably the title of copyrighted material was in someone else. This respondents did.

II.

Copyrights on a Publication Not Only Protect the Publication as a Whole, but All of the Copyrightable Component Parts of the Work Copyrighted.

(*Petition, page 23*)

The Circuit Court of Appeals did not deny relief solely on the ground that the sequence and arrangement of the two publications was different. On the contrary, the two last paragraphs of the court's decision on page

625 accurately list differences in style, garb and arrangement between the two publications and this includes the listings themselves. The respondents cannot improve upon the succinct statement made by the Circuit Court of Appeals commencing with the last paragraph of R626 and ending the fourth from the last line on R628.

III.

In Copyright Law, a Copy Sufficient to Constitute Infringement Is One which Ordinary Observation Would Cause to Be Recognized as Being Taken from the Original.

(Petition, page 25)

Respondents believe that Justice Bailey's definition in *West v. Francis*, 5 B. and A. 743, is sound, but neither Judge Bailey nor Justice Day would say that a defendant could not rebut the inference of copyrighting. In the present suit, the respondents have introduced all available source material prepared either by the respondents or by the airlines. This source material is 95% complete for the publisher's material and 85% complete for the airlines' source material. Moreover, most of the missing source material for the airline listings relates to the United Airline listing constituting some 12 pages or better than 10% of all the listings in the accused *Schedules* issue for April, 1943, Ex. 7, and here the printer's copy in Ex. M constitutes the source material because Fry testified that he had it prepared, R433. Respondents rebutted the inference of copying that arose from the similarity of the listing pages and the Circuit Court of Appeals' remarks commencing with the third from the last line at R628 to the end of the first paragraph on page 629 show how carefully it went into this matter. Petitioner devoted twenty pages of its brief in the Circuit Court of Appeals to pointing out common errors. There was no failure to bring these matters to the attention of that court.

IV.

A Copy, in Order to Be an Infringement, Need Not Be Identical in Sequence, Arrangement or Otherwise.

(Petition, page 25.)

V.

Defendants Can Have No Immunity from Their Infringing Acts on the Facts Shown by This Record.

(Petition, page 26.)

VI.

As Respondents Resorted to and Used Petitioner's Publication as a Whole, and Its Component Parts as Their Model to Pattern After, Directly and Indirectly, in Preparing Their Corresponding Publication, Charts, Maps and Other Component Parts Here Asserted, Petitioner Is Clearly Entitled to Relief Under the Authorities.

(Petition, page 26.)

Respondents have no quarrel with decisions cited in these three sections. Respondents have rebutted conclusively all charges of copying by respondents. As for any copying that may have been done by the airlines of their own listing pages, the airlines had the right to copy.

VII.

The District Court's Findings, Amply Supported by the Evidence, Should Have Been Followed and Adopted, and Not Disregarded by the Court of Appeals.

(Petition, page 27.)

The value of the trial court's findings of fact and conclusions of law are touched upon heretofore on pages 12 to 14.

VIII.

Infringement Not Avoided by Copying Indirectly or Copying from a Copyist.

(Petition, page 27.)

Respondents concede the validity of this rule, but they point out that it has no pertinency in this case because the alleged copyists are the airlines and they had a right to do what they did.

Conclusion.

Respondents submit that the petition for certiorari should be denied for three reasons.

Firstly, it raises primarily controversies of fact.

Secondly, the decision of the Circuit Court of Appeals is complete and sound. The idea of keying maps to time tables cannot be the subject of exclusive appropriation. Any copying of listing material was done either by the airlines or at their authorization and they had the right

so to do because they were the equitable owners of their own listing pages in the *Guide* by virtue of having paid for them. In view of the common sources of the material, and the nature of the material, there is no similarity between the publications sufficient to warrant an inference of copying of style, garb and arrangement.

Thirdly, if all the points raised in the petition for certiorari were resolved in favor of the petitioner, it would not necessarily result in a reversal of the decree below. Respondents additionally urged below that any exclusive rights to the style, garb and arrangement of the petitioner's *Guide* have long since been dedicated to the public by failure of the petitioner to repeat in its copyright notice the year of the issue which first presented the style, garb and arrangement to which petitioner claims exclusive rights. To enforce petitioner's complaint would result in petitioner getting a copyright forever on its style, garb and arrangement. Failure to repeat a copyright notice of a first edition in subsequent editions dedicates to the public anything contained in both editions, Broker, *Copyright, Its History and Its Law*, Constable & Co., Ltd. of London (1911) and Houghtin-Mifflin Co. of Boston and New York (1912), 134; Weil, *Copyrights*, (1917) Callaghan Co., pp. 243, 244, 342, 343; Drone, *Copyrights*, p. 270. Additionally, respondents urged in the court below the fact that petitioner failed to maintain its burden of showing originality in its copyrighted work because petitioner failed to introduce the source material sent to it by the airlines for the *Guide* and failed to cross examine the airline representatives when they stated that they originated the *Guide* listings. After the taking of the depositions the burden was squarely upon the petitioner. *United States Constitution*, Article I, Section 8, Clause 8; *Saake v. Lederer*, 174 Fed. 134, CCA 34d (1909); *Borden v. General Motors*, 28 Fed. Sup. 330, D.C. S.D. N.Y. (1939); *Amdur*,

Copyright Law and Practice, 1936, Chapter 17, Section 2, page 559. In this connection, as the record now stands, the airlines are at least joint authors with petitioner of their *Guide* listings, and a joint author has the right to authorize another to reproduce the jointly owned copyrighted property; *Amdur Copyright Law and Practice* (1936), Chap. XVII, Sec. 33, page 616, *et seq.*; *Herbert v. Fields*, 152 N. Y. Supp. 487 (1915); *Silverman v. Sunrise Pictures*, 273 F. 909, C. C. A. 2d (1921), 290 Fed. 804, Cert. Den. 262 U. S. 758.

Respectfully submitted,

J. GLENN SHEHEE,

Counsel for Respondents.

WILFRED S. STONE,

Of Counsel.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. ~~552~~
591

THE OFFICIAL AVIATION GUIDE COMPANY, INC.,
Petitioner,

vs.

AMERICAN AVIATION ASSOCIATES, INC., WAYNE
W. PARRISH, H. D. WHITNEY AND THOMAS E.
LINDSEY,

Respondents;

and

AMERICAN AVIATION ASSOCIATES, INC.,
Cross-Petitioner,

vs.

THE OFFICIAL AVIATION GUIDE COMPANY, INC.,
A COSMOS GARVY, JOHN W. GARVY, VINCENT
F. GARVY, JAMES R. BREMNER AND ELOISE A.
WILLIAMS,

Cross-Respondents.

CONTINGENT CROSS-PETITION FOR CERTIORARI
BY AMERICAN AVIATION ASSOCIATES, INC.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your cross-petitioner, American Aviation Associates,
Inc., respectfully prays the grant of the writ of certiorari

to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court affirming the dismissal of the counterclaim in the above entitled case, contingent upon this Court's granting petitioner's prayer for certiorari on the complaint.

A. Short Statement of the Matter Involved.

The issues raised under the complaint relate to certain types of copying charged to constitute infringement of petitioner's copyrights, while the issues raised under the counterclaim relate to the same types of copying charged to constitute infringement of cross-petitioner's copyrights.

The trial judge granted relief on the complaint and dismissed the counterclaim (R578-590). The cross-petitioner appealed from the trial court's disposition of both the complaint and the counterclaim (R591).

The Circuit Court of Appeals for the Seventh Circuit reversed as to the complaint, ordering that the same be dismissed; and affirmed the dismissal of the counterclaim (R631).

The petitioner seeks review by this Court of the Circuit Court of Appeals' judgment on the complaint only. By this cross-petition, cross-petitioner seeks to have the issues raised by the counterclaim considered by this Court should this Court deem it desirable to consider the issues raised by the complaint.

B. Jurisdiction of This Court.

This Court's jurisdiction to entertain this cross-petition is based on 28 U. S. C. § 347 (a) (Section 240 of the Judicial Code as amended by the Act of Congress, February 13, 1925, 43 Stat. 938). A petition for rehearing was denied by the Circuit Court of Appeals on August 9, 1945 (R654).

C. Only One Question Presents Itself.

If the Circuit Court of Appeals incorrectly ordered dismissal of the complaint, should not relief on the counterclaim be granted?

D. Reasons Relied Upon for Allowance of This Contingent Cross-Petition.

If this Court believes that the petition for certiorari should be denied, then this cross-petition may be ignored, because cross-petitioner believes that the complaint and the counterclaim must stand or fall together,—the result reached by the Circuit Court of Appeals.

On the other hand, if this Court believes that the judgment as to the dismissal of the complaint should be reconsidered, then the judgment as to the dismissal of the counterclaim should be reconsidered, for the bases of relief asserted by the complaint and the counterclaim are identical. The proofs offered at the trial are equally good as to the complaint and the counterclaim. Disposition of the complaint and the counterclaim, therefore, should be consistent. Cross-petitioner believes that recovery on both should be denied, but if recovery is to be granted on the complaint, then it should be granted on the counterclaim.

Respectfully submitted,

J. GLENN SHEHEE,
Attorney for Cross-Petitioner.

WILFRED S. STONE,
Of Counsel.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI.

Complying with Rule 27 of this court, the subject index of this brief is found commencing on page i. The decision of the Circuit Court of Appeals is found at R623 and is reported at 65 U.S.P.Q. 553. The decision of the trial court is found at R568, which is reported at 62 U.S.P.Q. 178. A supplemental trial court opinion is at R577 and was not officially reported. The statement of jurisdiction is found on page 2 of the contingent cross petition for certiorari. A concise statement of the case, so far as it affects the counterclaim, is found on page 2 of the contingent cross petition for certiorari and in the following pages of argument. The reasons for granting the writ are presented on page 3 above.

ARGUMENT.

If the principal petition is granted, this cross-petition should be granted, because the types of copying asserted to constitute copyright infringement of the petitioner's publication, called herein the "*Guide*," are the same as the types of copying asserted to constitute copyright infringement of the cross-petitioner's publication, herein called the "*Schedules*." The proofs as to these types of copying are equally good because they are all equally based on inferences drawn from the similarity of documents which are in evidence as exhibits. If, therefore, this Court believes that cross-petitioner's acts constitute infringement, and grants the principal petition, then it should also believe that petitioner's acts constitute infringement, and accordingly grant the cross-petition.

Briefly, the situation is this. Petitioner's *Guide* is a monthly compendium of airline time tables, fare tables and information. It has a bright blue cover. The copyrighted issues of the *Guide* charged in the complaint to be infringed consist primarily of some thirty airline listings arranged non-alphabetically. Listings vary in size from one-quarter of a page to many pages and the airlines pay the *Guide* at an advertising rate per page. The time tables in these paid listings are rendered more usable by general indices and by keying them to maps showing airline routes. There are a few pages of travel and airmail information. (A cursory examination of any one of petitioner's issues, Exs. 1 to 5, R343, will substantiate the foregoing, except as to the page rate, for which see opinion of Circuit Court of Appeals, R629, 630; Ex. GGGG, received in evidence at R509 but shown there by error as Ex. DDDD; Chase, R362 and R132; the trial court made no finding of fact thereon.)

The accused publication, the *Schedules*, has a bright red cover, and is much the same sort of publication as the *Guide*. It is a compendium of airline listings supplemented by maps keyed numerically to the time tables and by indices. The *Schedules*, however, arranges the airline listings alphabetically and employs a different method of keying time tables to maps, (CCA opinion, R625, and see Exs. 7-10, R344). These two methods make the indices and the maps in the *Schedules* original compilation problems.

In preparing *Schedules'* first edition, three or four airlines sent to the cross-petitioner source material which appeared to be original, but which, upon inspection after institution of this suit, appeared to have been copied, at least in part, by such airlines from their listings that they had run the previous month in the petitioner's *Guide* (see, for example, American Airline source material in Ex. M at M-8 to M-17, offered at R452, and see R455-457). This resulted in a close similarity between those particular air-

line listings as they appeared in the *Schedules* and the same airline listings as they appeared in the *Guide*.

After the first issue of the *Schedules* had been published, the *Guide* abandoned its long established non-alphabetical arrangement of airline listings in favor of the *Schedules* alphabetical listing (Ex. 5, *Guide* for May, 1943, R343), and adopted certain features of listing page set-up that cross-petitioner's *Schedules* employed (listed in cross-petitioner's Point 15c to 15h at R600-601 with references to Ex. 5). Additionally, one airline sent to petitioner's *Guide* for publication material which was copied verbatim from an earlier listing of that airline appearing in the *Schedules*, and the *Guide* published this material verbatim. (A comparison of pages 84 and 85 of *Schedules* for August, 1943, Ex. 26, R396, with pages 98 and 99 of *Guide* for September, 1943, Ex. JJJ, R423, shows that they are identical including marks referring to footnotes. A comparison of the fare table footnotes entitled "Fare Table Reference Marks Explained" on page 86 of *Schedules* for August, 1943, Ex. 26, R396, with the fare table footnotes entitled "Explanation of Reference Marks" on page 100 of *Guide* for September, 1943, Ex. JJJ, R423, shows that the footnotes are entirely different. The *Guide* reference marks are not explained in the *Guide*'s footnotes. Thus, on page 98 of the *Guide*, Ex. JJJ, Boston carries the mark "(n)", which on page 100 of Ex. JJJ has this footnote: "Via Mid-Continent Airlines Minneapolis-Omaha or, -etc.", which is meaningless. However, the footnote (n) in the *Schedules* at page 86, Ex. 26 reads "(n) Via American Air Lines between Newark or New York and Boston.", which is correct. The trial judge declined to admit evidence as to how the petitioner happened to copy cross-petitioner's publication (R463.)

Petitioner contends under its complaint that cross-petitioner had no right to put out a publication which has

firstly, maps of airline routes keyed numerically to airline time tables, and secondly, which has airline listings copied by a few airlines from their own paid listings in the *Guide*. Cross-petitioner contends under its counterclaim that petitioner had no right to adopt *Schedules'* alphabetical arrangement of airlines or any of several style features shown in *Schedules*, and secondly, that petitioner had no right to print material which an airline had copied from the *Schedules*.

From the foregoing it should be clear that if cross-petitioner's alleged copying of ideas and alleged use of airline advertisements copied by the airlines from the *Guide*, constitute copyright infringement, then the petitioner's alleged copying of ideas from the *Schedules* and using material copied by an airline from the *Schedules*, likewise constitute copyright infringement.

Cross-petitioner urges that the complaint and counterclaim should fall together, and so indicated at the time the counterclaim was filed, R92. The dismissal of both complaint and counterclaim by the Circuit Court of Appeals seems to cross-petitioners to be sound, but if one is to be reconsidered, then the other should be.

Respectfully submitted,

J. GLENN SHEHEE,

Attorney for Cross-Petitioner.

WILFRED S. STONE,

Of Counsel.



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CLERK'S REMOTE DISPLAY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 552

THE OFFICIAL AVIATION GUIDE COMPANY, INC.,
Petitioner,

vs.

AMERICAN AVIATION ASSOCIATES, INC., WAYNE
W. PARRISH, H. D. WHITNEY AND THOMAS E.
LINDSEY,

Respondents:

**REPLY BRIEF FOR PETITIONER IN SUPPORT OF
ITS PETITION FOR CERTIORARI**

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IN THE
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LINDSEY,

Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF
ITS PETITION FOR CERTIORARI.

STATEMENT.

Respondents base their principal argument on assumptions contrary to the record in this case, and present afterthought theories which are simply a sham and delusion.

We refer this court to our petition and brief in support thereof for a *correct* exposition of the facts and law applicable.

We beg leave to submit this reply directed to certain points urged by respondents.

I.

Respondents, at the bottom of page 19 and the top of page 20 of their reply, say that the statement on page 6 of our petition that respondents' employees admitted that they copied from petitioner's publication is not supported by the record at the pages there cited. There is no such statement made on page 6 of petitioner's brief, but it is made elsewhere, and is fully substantiated and supported by the record.

How respondents can contend that they did not actually copy *directly* from petitioner's copyrighted publication is *inconceivable*. That they did *copy directly* is not only established by petitioner's witnesses, but out of the mouths of respondents' own witnesses.

In respondents' scrapbook (Def. Exh. M), there is a large amount of printer's copy on white ruled sheets bearing the initials "J. C." (meaning Jerome Cook, one of respondents' witnesses and employees). All of this copy, Whitney, another of respondents' witnesses, and one of the actual respondents, testified was prepared by Cook (R. 449). Concerning such copy sent to the printer and marked with the initials "J. C.", Cook, testified (R. 523):

"Q. And you know this so-called copy sent over to the printer you said was in your handwriting is taken from tear sheets from plaintiff's publication, don't you?

"A. The copy I prepared, yes, was taken from sheets torn out of this book." (Referring to petitioner's copyrighted publication.)

If that isn't proof of direct copying, then we don't know how to prove direct copying. Do respondents expect us to prove it was done in open court in the presence of the judge?

Further Chase, petitioner's former employee, one of the prime movers in organizing the infringing publication and who aided in preparing the first infringing edition, testified (R. 365) that in preparing the initial issue, he and those working with him, Whitney and Parrish, *actually had before them* copies of petitioner's copyrighted publication, and that he (Chase) used sheets torn from the Official Guide of the Airways in making up the infringing copy. Respondents claim that certain copy included in respondents' scrapbook, Exhibit M, was sent to the printer and used for printing the first infringing issue. Chase, after saying that certain copy in that book was in his handwriting, for example, Exhibits M-8-1, M-8-2, M-9-1, M-9-2, etc., was asked (R. 367):

"Q. Was that copied from plaintiff's publication by you?"

And he answered:

"A. To my recollection, yes."

This copying was done by Chase while managing editor for respondents prior to February 12, 1943, as that was the date he severed his connection and never was in their office thereafter (R. 366). He further testified that the same was true as to copying Exhibits M-10-1, M-10-2 and M-12-1, sent by respondents to their printer for their first infringing edition.

The only employees, other than officers of the respondents, who aided in preparing the initial infringing copy were Whitney, Cook and Chase (R. 467). Whitney testified (R. 467) that they had before them copies of petitioner's copyrighted publication, and that the printer's copy which they first made up for respondents' publication was sent to the printer. He was with Chase (R. 471) when he prepared the copy, and he saw him do it, and both had copies of petitioner's genuine copyrighted

publication before them at the time (R. 471) which they examined many times and referred to constantly. Mr. Chase had a copy, Mr. Cook had a copy, and Mr. Lindsey had a copy, and they discussed the petitioner's publication (R. 471).

All of these things were done before they received anything whatever from any of the airlines. Parrish, president of the respondent corporation (R. 529), testified (R. 541-542):

"Q. Now, Mr. Parrish, at the time you had authorized the printing and circulation of your brochure, Plaintiff's Exhibit 11, you had at that time definitely decided on the form that the proposed publication was to take, the style, arrangement and garb, had you not?

"A. Generally speaking, yes.

"Q. And you followed that plan in your publication?

"A. Yes.

"Q. There was no change in that—strike that out. When you sent out that brochure late in January, 1943, you had then decided on the model, I mean fully as to size, style, form, arrangement and garb?

"A. You say late in 1943?

"Q. January 1943?

"A. January, '43, yes. By and large the pattern was established, yes.

. . . .

"Q. So far as the April (1943) issue did go, it did follow that model that was determined in January, 1943?

"A. As far as it went, yes.

"Q. In January, 1943, you had before you then personally, as well as your other associates, copies of plaintiff's publication?

"A. There were a few copies around, yes."

II.

Respondents make no contention that anyone outside of petitioner's organization contributed one iota to conceiving and originating petitioner's copyrighted publication as whole or any of the component parts based on the *master airline charts of the United States and the airline charts of Central and South America, or to the contents section*. They do, however, contend that the airlines contributed to certain component parts, viz: certain *listing sections*, and attempt to say that the airlines originated the Guide listings, or are at least joint authors with petitioner of the Guide listings. There is no basis whatever in the record to support such a statement.

In our main brief, we said at page 5:

"Aside from the complete publication being original and new as a whole, it embodies several copyrightable component parts, such as the *master airline charts, contents section, layout and listing sections clothing the desired information and facts in petitioner's own expression, style and garb*, all conceived and originated by petitioner at its own expense, for its own use, as an inherent part of its publication (R. 64, 67, 68, 355-356, 360, 393, 394)."

That statement is clearly proven by the record cited, and the pages of the record cited on pages 19 to 23 of petitioner's brief do fully substantiate the statements there made.

After an initial listing has been published *embodying petitioner's original expression, style and garb*, it was the *standard practice*, of petitioner for the next ensuing issues, to take listing pages from its previous issue and mail them to the airlines to enter corrections thereon. It is because the airlines did make such corrections on

petitioner's submitted copy embodying petitioners' original *expression style and garb* that the respondents now argue that because an airline did that, it is a joint author. Chase, who had entire charge of petitioner's publication from practically the outset in 1929 down to 1940 and prepared all the listing sections himself, testified (R. 360):

"Q. Well, then after the second edition or the next edition, what is the routine or standard practice?

"A. For the ensuing issues that particular page or those pages are taken from the Guide and mailed to the Airline. They are asked to enter such corrections as are necessary in the margins or attach them in the form of new copy and we will do the rest.

"Q. Do you prepare a copy for the printer, of the edition?

"A. Yes."

Defendants' witnesses Fry and Whitney were forced to admit that such procedure was petitioner's *standard practice* throughout the years (Fry, R. 437; and Whitney, R. 477).

Vincent Garvy, who handled that work during Chase's absence from June 1940 to December 1943, testified (R. 392-393) that during the entire period that Chase was not there, he had charge of preparing the new edition for each month, and that the facts were collected from various and sundry sources, including the airlines, in the form of letters, time-tables, etc. Thereafter, as he testified (R. 393):

"We compiled it and arranged it with instructions for the printers how it was to be set to conform with our style."

Dr. Garvy testified to the same effect (R. 346-347).

Fry first attempted, on direct examination, to say that he prepared the copy relating to United Airlines for one issue. He was asked on direct (R. 430) to fix the

time. He answered, "Approximately the spring of 1940." There is in evidence a bound volume of twelve issues of petitioner's publication for the year 1940 (Pl. Exh. 37). This, as well as earlier editions, shows that the prior listing sections relating to United Airlines, as to *expression, style and garb*, are substantially identical. Some of the facts differed because of current changes, but the *expression, style and garb* and most of the facts clothed therein, prior to the time that Fry claims he prepared certain pages of the listing section, were the same. Undoubtedly what Fry meant was that he was sent a tear sheet from one of petitioner's previous issues, and that he added additional facts which were embodied in petitioner's *expression, style and garb*, such as flights, trips and fares, etc., for on cross-examination he testified (R. 437):

"Q. Now, in order to shorten this with regard to your relationship with the plaintiffs' publication, now is it a fact that it is the standard practice each month to prepare a new edition of the plaintiff's publication and in preparing that edition that some one connected with the plaintiff company then sent you a lay-out paste up, understand, or a detached sheet for you or somebody else in your department, to make any corrections that might occur with respect to any flight or some other detail matter, is that the standard practice?

"A. The standard practice in so far as we are concerned receive tear sheets or tear their own sheets from the old Guide and forward revisions to us.

"Q. In the case of tear sheets, don't we send every month before the 20th tear sheets with some notations and so on with the corrections on them and ask you or some one under you to make such further additional corrections as you think should be made to bring the listing situation up to date?

"A. Yes.

"Q. That is the standard practice?

"A. Yes."

On redirect he said (R. 440) that after respondents started in this field (April 1943), United did send in the corrections first and then the petitioner noted the corrections. Respondents' witness Whitney, one of the respondents himself, testified on cross (R. 477) that it was the *standard custom and practice* of the petitioner to make paste-up proofs by clipping pages from a previous issue and to send such copy to the airlines for current corrections as to facts.

Whitney, upon direct (R. 442), apparently was trying to take some credit for the copy of the United Airlines listing which appears in petitioner's publication for January 1943. Obviously, what he meant was that following the usual practice, when the copy was sent in for the next month, he noted thereon changes or corrections as to flights, etc., because the expression, style and garb, arrangement and combination of the listing sections relating to the United Airlines for that period were substantially identical with the previous issues. Moreover, in his cross-examination (R. 477), he makes it clear that he did *not* prepare the copy for United Airlines with the expression, style and garb as it appears in petitioner's publication, for December 1942, and February 1943, or any other time.

On *redirect*, he testified as follows (R. 484-485):

"Q. On cross examination you were asked whether or not you prepared the copy for the December, 1942, United Airline Schedule and January and February, 1943 OG issue and you answered no. Will you clarify that answer?

"A. I was not with the United Airlines in 1943. I had prepared copy for December, 1942.

"Q. You had prepared the Guide for January, 1943?

"A. I gave that advice over the telephone.

"Q. Well, the Guide for January, 1943 was prepared in what month?

"A. December.

"Q. Who was your employer?

"A. I beg your pardon?

"Q. In whose employ were you in December of 1942?

"A. United Airlines.

"Q. Did you prepare the copy for that 1943, January 1, issue of plaintiff's publication?

"A. To the best of my knowledge I did, or the fellow who took my place might have done it, under my supervision to give him the experience."

In view of that situation, he was confronted on re-cross (R. 486), with Plaintiff's Exhibit 34, which was petitioner's file relating to United Airlines, containing copies of just what was prepared by petitioner, and what, if any, copy was supplied by the airline relating to United Airlines' listing section for January 1943, and he was asked (R. 486):

"Q. As a matter of fact, did not Vincent Garvy (petitioner's employee) send you this material, Plaintiff's Exhibit 34, in this form, send it in to you in that form for correction?

"A. Yes, sir.

"Q. For that issue?

"A. Yes, sir, that is my handwriting, however, on the corrections.

"Q. You made the corrections?

"A. Yes, sir.

"Q. That is all you did on that material?

"A. Yes, sir.

"Q. The over-all layout and paste-up was prepared by Mr. Garvy and sent to you?

"A. Sure."

The layout for the United Airlines listing contained in this file is a paste-up consisting of tear sheets from the previous issue of petitioner's publication. The only thing

on it which Whitney claims to have done was to note certain corrections as to current facts. That is a far cry from being the author or joint author of that section.

Moreover, this clearly shows that the witnesses who attempted to claim some credit of authorship for the *expression, style and garb* were nailed and thoroughly discredited when confronted with the actual record.

According to respondents, their whole contention of co-authorship apparently is based on Fry and Whitney, one of whom was proven, out of his own mouth, to have testified falsely as to authorship, and the other was thoroughly discredited.

Respondents clearly misrepresent the situation regarding the depositions which they took and which they claim were not read by the trial judge before his first opinion. They repeatedly contend that these depositions were taken to establish the authenticity of the source material sent to the respondents by those particular deponents, and secondly, to shift the burden of going forward from themselves to the petitioner on the issue concerning who was the author of the airline listing pages in petitioner's Guide. Those depositions were taken for the purpose of showing that a *certain limited* amount of material appearing in respondents' scrapbook, Exhibit M, which scrapbook was exhibited to the deponents, was sent by them to the respondents. The whole direct testimony of each witness was directed to that point. Such facts and sections were explained repeatedly to the District Court at the trial. It was not controverted that *certain* material was sent in, as stated in the depositions. The respondents put on in open court *Whitney*, who identified the scrapbook Exhibit M, and testified that the *certain* material referred to in the depositions was so sent to the respondents.

As to the second point, that the depositions were taken to shift the burden of going forward from respondents to

the petitioner on the issue concerning authorship of the airline listing pages such contention is a sham and a delusion, wholly without any support in the record, for there is not one particle of evidence in the depositions, either direct or cross, that any of them initially conceived and originated any part or parcel of the copyrighted publication, or any of the listing sections thereof. There are some vague, indefinite unresponsive answers volunteered by some of the witnesses on cross-examination to the effect that certain of them had furnished "*information*" contained in their listing sections to the petitioner. There never was any controversy on that particular point. In fact, the petitioner conceded in the court below, and has conceded in its petition here that much of the "*information*" clothed in petitioner's listing sections was furnished by different sources including airlines.

The only instance in the entire record, where the respondents even attempt to show that anyone other than the petitioner prepared and supplied any copy for the listing pages *as published*, was at the trial, and that was with respect to United Airlines. In connection with the United Airlines listing, two of respondents' witnesses, Fry and Whitney, attempted to say that each prepared a copy of certain pages of the United Airlines listing for two different issues, but as heretofore pointed out, the testimony of one of those witnesses was proven to be false, *out of his own mouth, when confronted with the record*, and the other was thoroughly discredited.

As the trial court said (R. 577):

"The depositions in question refer to circumstances surrounding the preparation of the source material contained in the large book designated 'Defendants' Exhibit M' which the Court in its Memorandum of June 29th admitted into evidence over the objection of plaintiff's counsel. Having fully considered the source material itself prior to filing the Memorandum

of June 29th, any ultimate facts contained in the said depositions were fully before the Court at that time."

There is nothing whatever in the depositions to show lack of authorship in petitioner's organization as to the expression, style and garb of each and every listing section in petitioner's copyrighted publication. These depositions can be searched in vain without finding a single instance where any of those witnesses even attempted to say that they contributed anything to or had anything whatever to do with the expression, style and garb of plaintiff's listing section. The most any of them said was that they prepared "*information*". Most, if not all, of them were clerks who entered the field long after petitioner conceived and originated its expression, style and garb for clothing the facts and information appearing in its listing sections.

Respondents, in their showing on pages 4, 16 and elsewhere, cite or refer to Mossman (R. 181), Graham (R. 197-198), McInerny (R. 206), Smith (R. 242), Brinkley (R. 291), and Wyman (R. 325), but not one of these witnesses, there or elsewhere, make any claim or contention whatever that they had anything whatever to do, or contributed one iota to the *expression, style and garb* of the listing sections referring to their respective airlines, as they appear in petitioner's copyrighted publication.

Mossman merely volunteered on cross examination (R. 181) that "We prepared all of this", referring to the *particular copy* he gave respondents, and he admitted at the time he was familiar with the previous expression, style and garb of the listing sections relating to their line previously appearing in petitioner's publication, and that while he was only familiar with them since 1939, that he knew that the listings appeared prior to that time in petitioner's publication.

Graham said nothing about contributing anything whatever, to any listing in petitioner's publication, but did attempt to testify, over objection, that it was a custom in the airline business in the City of New York, in the year 1943, for an airline to authorize copying from one magazine for publication in another. That has nothing to do with this case. It is certainly a far cry from proving lack of authorship, but on cross-examination, he was forced to admit (R. 199), that it was the custom "not to copy copyrighted material."

McInerney said nothing whatever about creating any listing section. She did testify that she "certainly was peeved" because when she sent respondents a tear sheet from petitioner's publication, she was told by them that they couldn't use that, and she was very much annoyed because, as she said, it contained our "*information*". Apparently, she was under the erroneous impression that someone was objecting to their using the *information*, *per se*, but nowhere did she say that the expression, style and garb was theirs, nor did she make any claim to it. While she claimed that she did eventually send in some *information* to the respondents, she testified (R. 208) that the layout sheet in respondents' scrapbook was not sent in by her or prepared by her or by her line, and that it certainly did not come from her.

Smith (R. 242), while he testified he sent in *information* to the respondents, definitely testified that he did not prepare or send in the layout sheet. He makes no claim anywhere that he conceived or originated or had anything to do with the *expression, style and garb* of the listing section which appeared for years in petitioner's copyrighted publication. While at one place, he attempts to say he prepared copy of the listing section for the March issue of the Guide, if he did, he was simply following and copying petitioner's expression, style and garb of previous

issues, because the previous issues are substantially identical, as shown by the exhibits.

Brinkley (R. 291), there is nothing in his entire deposition that he had anything to do, contributory or otherwise, with the conception or origin of the *expression, style and garb* of the listing sections relating to his line, as they appear in petitioner's copyrighted publication.

Wyman (R. 325), likewise, makes no contention or claim whatever that he had anything to do with the conception and origin of the *expression, style and garb* of the listing sections relating to his line as they appeared for years in petitioner's copyrighted publication. He merely said that he thought they were free to publish "*that information*" (italics ours), meaning the information contained in the listing section in any other Guide publication or public time table or any place they saw fit.

It is thus clear that there is no evidence whatever in the entire record that any of these clerks or representatives of these different airlines mentioned in respondents' showing were joint authors or contributed one iota to any of the copyrighted component parts relied on in this case, or that they contributed one iota to the conception and origination of the *expression, style and garb* of the listing sections relating to their respective lines as they appeared in petitioner's copyrighted publication years before this suit was filed, and years before the respondents entered the field, at most they merely furnished "*information*".

III.

While a large amount of information and data on pieces of paper was received by the respondents from various airlines after *February 13, 1943*, in practically every instance, with the possible exception of American Airlines, they

merely sent the respondents "*information*" and not the layout. The layout for the printer for the page construction embodying the *expression, style and garb* was prepared and furnished the printer by the respondents, and not by the airlines.

IV.

Respondents repeatedly refer to *Perris v. Hexamer*, 99 U.S. 674, mentioned in the opinion of the Court of Appeals, and apparently attempt to criticize petitioner because it did not discuss this case. There was no reason for discussing it because it has nothing to do with the situation here. In that case, the Court referring to the maps involved, said (page 676):

"Those of the defendant represent Philadelphia, while those of the complainants represent New York. They are not only not copies of each other, but they do not convey the same information."

While in the present case, respondents' maps, were obviously copied from petitioner, as they were *before the maker of respondents' maps and charts*, and they embody substantially the same *expression, style and garb*, and convey substantially the same information.

V.

Respondents urge (page 24) that petitioner is not entitled to relief because of failure to repeat in its copyright notice the year of the issue which first presented the style, garb and arrangement to which petitioner claims exclusive rights. It is *stipulated* in this case that the petitioner publishes a *new edition each month* and each edition is marked with copyright notice as to the year of publication. That notice is amply sufficient under the statute and authorities.

(*West Publishing Co. v. Edward Thompson Co.*, 176 Fed. 833, 835 (C.C.A. 2); *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8136, (Mr. Justice Clifford); *Triangle Publications, Inc., et al. v. New England Newspaper Pub. et al.*, 46 F. Supp. 198 (D.C. Mass.); Howell on Copyright Law, pp. 66-67 (1942); Copyright Office Regulations, Rule 201-4, Section 2; Rule 201-17 of the Copyright Office Rules; *Sauer v. Detroit Times Co.*, 247 Fed. 687.) None of petitioner's copyrights have expired. The first edition was published in 1929. Therefore, copyright on each new edition protects all matter therein "on which copyright is already subsisting, but without extending the duration or scope of such copyright." (Sections 3 and 6 of the Copyright Act.)

VI.

Respondents' contention that petitioner was paid an *additional* \$4.00 per page per issue for the listing pages to compensate for additional work has no basis whatever in this record. It rests merely on the *figments of respondents' imagination*. The respondents do not and cannot cite any evidence or proof in the record to support any such contention. They do, however, cite the opinion of the Court of Appeals on the point. If the Court of Appeals did reach any such conclusion, it was reached without any evidence whatever in the record to support such a conclusion.

VII.

Opposite page 6, respondents insert in their brief a comparative chart showing a comparison of *only one* page relating to listing concerning Northwest Airlines, and which they say is typical. That statement is simply in error. It is not typical. Moreover, they selected only one page out of the whole 150 pages of petitioner's publication

which they undoubtedly thought was most favorable to them. Even so, the Northwest Airlines listing in respondents' first issue of April, 1943, was not compared with petitioner's previous listing in its publication of March, 1943, but was compared with May, 1943. Further, the Northwest Airlines listing in petitioner's publication for March, 1943, consisted of *four* pages, and those four pages appear in respondents' initial edition for April, 1943, in substantially the same *expression, style and garb* and contain substantially the same information. Why didn't they make a comparison, if they were seeking to fairly present the facts, with respect to all four pages of the Northwest Airlines listing in petitioner's issue of March, 1943, with the corresponding four pages in respondents' initial edition of April, 1943? The answer is obvious from a mere casual examination of the two issues.

CONCLUSION.

For the reasons set forth in our petition and supporting brief and this reply, it is believed that this is certainly one of the cases where this Court should grant a writ of certiorari.

Respectfully submitted,

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November 15, 1945.